Supreme Court, U.S.
FILED
00 643 OCT 18 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

BRUCE GREEN, et al.,

Petitioners,

v.

CITY OF PLANO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN M. CRAMPTON*
Chief Counsel
AMERICAN FAMILY ASSOCIATION
CENTER FOR LAW & POLICY
P.O. Drawer 2440
Tupelo, MS 38803
(662) 680-3886

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pp

QUESTION PRESENTED

Whether two unpublished lower court opinions imposing sanctions on Petitioners that are so obviously and injuriously erroneous and have so far departed from the accepted and usual course of judicial proceedings so as to create "a secret body of law," warrant the exercise of this Court's supervisory power?

LIST OF PARTIES

Respondents:

City of Plano

Mark Hunt, in his official capacity as City of Plano police officer

Terry Pauley, in his official capacity as City of Plano Police Department

Robert Leitz, in his official capacity as City of Plano police officer

Petitioners:

Bruce W. Green; Brian Fahling; Michael J. DePrimo; Bryan J. Brown; Phillip Prescott

Plaintiff in the District Court:

Mark Harry Gabriel

CORPORATE DISCLOSURE STATEMENT

Petitioners Brian Fahling, Michael DePrimo, Bryan J. Brown, Bruce W. Green and Phillip Prescott, by and through counsel and pursuant to Fed. R. App. P. 29.6, files this Corporate Disclosure Statement and shows the following:

Petitioners Fahling, DePrimo, and Brown are employees of American Family Association, Inc. (AFA, Inc.). Stephen M. Crampton is one of the attorneys for the Petitioners and is also employed by AFA, Inc. AFA, Inc. is a Mississippi non-profit corporation. It has not issued shares or debt securities to the public. AFA has no parent company, and no publicly-held company has a ten percent (10%) or greater ownership interest in AFA.

Petitioner Bruce W. Green is employed by Alliance Defense Fund, Inc. Petitioner Phillip Prescott is employed by Prescott & Prescott.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

BACKGROUND 4

1. Sanctions for Filing Mandatory Disciplinary Charges 5

   a. The disciplinary charges initiated in the district court and grievance filed with the state bar were mailed out simultaneously 7

   b. The local rules for the Eastern District of Texas required that the disciplinary complaint be filed *ex parte* with the lower court 7

   c. The factual basis for initiating disciplinary proceedings 8

2. Sanctions for Refusing to Dismiss Mayor Who Was Named in His Official Capacity 9

3. Sanctions for Written Discovery Requesting the "Same Documents" 10

4. Sanctions for filing "Repetitive Motions" 10

   a. The Internal Affairs file 10

TABLE OF CONTENTS – Continued

Page

b. Motion to compel Internal Affairs report concerning Plaintiff 11

5. Sanctions for Opposing Motion to Designate Expert Witnesses 12

6. Sanctions for Withdrawing Excessive Force Claim 13

7. Plano's Time Records 14

THE REASON FOR GRANTING THE WRIT 15

The Lower Court Decisions were Dramatic Departures from the Accepted and Usual Course of Judicial Proceedings 15

A. The Unpublished Lower Court Decisions are Unsupported by the Record and Existing Law, and are "So Obviously and Injuriously Erroneous 'As to Call for an Exercise of this Court's Power of Supervision' " 16

B. The Two Unpublished Decisions Create a Secret Body of Law Applicable Only to Petitioners 18

ARGUMENT 21

The Fifth Circuit Failed to Adhere to Its Own Standard of Rigorous Review of 28 U.S.C. § 1927 Sanctions 21

A. The district court relied upon plainly erroneous facts by adopting *in toto* the factual misrepresentations of Plano 24

TABLE OF CONTENTS – Continued

Page

B. The district court ignored its previous factual findings and legal conclusions .. 26

C. Sanctions were awarded despite the complete absence of billing records..... 28

D. The district court failed to demonstrate that sanctions were necessary to carry out the purpose of § 1927..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Aiken v. Q-L Investments, Inc., 959 F.2d 521 (5th Cir. 1992) 29, 30

Anastasoff v. United States, 223 F.3d 898, 2000 LEXIS 21179 (8th Cir. 2000) 20, 21

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 14

FDIC v. Calhoun, 34 F.3d 1291 (5th Cir. 1994) 27

Gibson v. Lockheed Aircraft Service, Inc., 350 U.S. 356 (1956) 15

Thomas v. Capital Security Services, 836 F.2d 866 (5th Cir. 1988) (en banc) 19, 22, 30

Topalian v. Ehrman, 3 F.3d 931 (1993) ..19, 22, 23, 29, 30

United States v. Jolly, 493 F.2d 672 (2d Cir. 1974) 20

Willy v. Coastal Corp., 855 F.2d 1160 (5th Cir. 1988) 28

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1927 ..... *passim*

OTHER AUTHORITIES:

Dragich, *Will the Federal Courts of Appeals Perish if they Publish? Or does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U.L. Rev. 757 (1995) 18, 20

Richman & Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996) 17, 19

TABLE OF AUTHORITIES – Continued

Page

Eastern District of Texas Local Rule AT-2(d)(2)(A) 7, 8, 26

Eastern District of Texas Local Rule 3(d) 7, 26

Local Rule 47.5.4 of the Fifth Circuit Court of Appeals 20

PETITION FOR A WRIT OF CERTIORARI

The undersigned counsel of record, on behalf of Petitioners Bruce W. Green, Brian Fahling, Michael J. DePrimo, Bryan J. Brown, and Phil Prescott, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled proceeding.

OPINIONS BELOW

The Fifth Circuit Court of Appeals, in a *per curiam* opinion, affirmed orders[1] of the District Court imposing sanctions against Petitioners Green, Fahling, DePrimo, Brown, and Prescott. The Fifth Circuit's consolidated decision, No. 99-40928 and No. 00-40021, is unpublished and is reprinted in the Appendix hereto, App. 1-4. The summary affirmance is located at 220 F.3d 585. The Fifth Circuit denied a petition for rehearing *en banc* on July 20, 2000. The denial of the Petition for Rehearing En Banc is reprinted in the Appendix hereto, App. 24-25. The memorandum opinion and order of the United States District Court for the Eastern District of Texas, Sherman Division (Brown, D.J.), 4:96-CV-362, is also unreported, and is reprinted in the Appendix hereto, App. 7-20. The order of

[1] After entering its order imposing sanctions against Petitioners, defendants brought a motion to clarify the same regarding whether or not the district court intended to include an assessment of fees against Petitioners for defendants' preparation of their sanctions motion. The district court subsequently clarified the order, imposing an additional $15,000 sanction on Petitioners.

the district court clarifying its July 20, 1999 order is not reported and is reprinted in the Appendix hereto, App. 5-6.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered June 13, 2000. The Court of Appeals denied a timely petition for rehearing *en banc* on July 20, 2000. App. 24. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1927 provides in pertinent part: "Any attorney . . . who so multiplies proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

STATEMENT OF THE CASE

Petitioners are five attorneys, four of whom work for a public interest law firm that provides *pro bono* representation for civil rights litigants, one of whom, Petitioner Fahling, did not appear in the case until nine months after it had been filed and some of the allegedly sanctionable conduct had occurred. Petitioner Prescott served only as local counsel in the underlying litigation and did not participate, nor was he present, in any of the events

that resulted in sanctions. The litigation involved a challenge to a provision of the Texas Education Code, which, it was alleged, had been unconstitutionally applied to oral protesting and leafleting in a [traditional] public forum adjacent to school property.

In October 1997, pursuant to mandatory reporting requirements, Petitioners Green, Fahling, DePrimo, and Brown initiated disciplinary proceedings against one of the defense counsel in the district court and with the Texas State Bar, alleging through sworn affidavits that he had falsified documents. On January 8, 1998, the second day of trial, the district court, from the bench, granted defendants' oral motion for judgment as a matter of law on the merits of Plaintiff's case. In April 1998, first the Texas State Bar, and then the district court, found there was insufficient evidence to support a finding of ethical wrongdoing on the part of defense counsel. On August 11, 1998, the district court entered final judgment for defendants in the challenge to the Texas Education Code. On August 25, 1998 (seven months after trial), defendants moved for sanctions against Petitioners pursuant to 28 U.S.C. § 1927, and on December 28, 1998, the district court held a hearing on the matter. On July 20, 1999, the district court entered an order imposing sanctions against Petitioners jointly and severally totaling $52,820.50. App. 7-20. Several months later, in response to defendants' motion to clarify the district court's July 20, 1999 order, an additional $15,000 sanction was imposed against Petitioners for preparation of defendants' motion for sanctions. App. 5-6.

BACKGROUND

Plaintiff filed a verified complaint and a motion for preliminary injunction on October 21, 1996. Plaintiff twice filed motions to expedite the hearing of his motion for preliminary injunction. The district court never granted a hearing or ruled on the motion. Instead, nine (9) months later, the district court set the matter for trial on October 1, 1997. Formal discovery commenced in June, 1997, and was essentially completed by mid-September, 1997. Trial was held January 7-8, 1998.

In the order imposing sanctions, the district court found that "[t]he litigation was contentious from the very beginning." App. 8. Counsel for both parties occasionally employed unpleasant rhetoric. For example, in an *unfiled* response in opposition to a motion for enlargement of time asserting as one ground the complexity of the issues, one exasperated Petitioner argued that "[e]ven if Defendants have been unable to secure counsel capable of grasping the issues," the motion should be denied. App. 9.

Similarly, when, in an effort to explore an early resolution to the case, Petitioner Brown sought clarification of Plano's position due to the tender of an affidavit (in support of Defendants' motion to dismiss) indicating that Plaintiff would not be subject to arrest if he were to return to the forum, Plano's counsel responded with profanity and refused to explain Plano's position. App. 66.[2] Instead of offering clarification, Plano's counsel warned

---

[2] The district court's order contains no discussion or mention of the affidavits and pleadings submitted by Petitioners in opposition to the § 1927 motion.

Petitioners that if they advised Plaintiff to return to the forum, "[y]ou do so at your own peril." App. 68. This warning was made *after* the issuance of police memoranda that instructed police officers to respect the rights of protesters, and was understood to prohibit application of the challenged provision of the Texas Educ. Code to protest activities. App. 54-55. The existence of the memoranda was not disclosed by Plano until almost a year later when a police officer who was being deposed revealed their existence. App. 30-31.

Plano's counsel refused to tender documents pursuant to Plaintiff's production requests, contending that Plano possessed no document relevant to any claim or defense.[3] The adequacy of police training in a variety of areas was in issue, and high level police officials disseminated new written guidelines as a result of Plaintiff's lawsuit. App. 54-55. In its order imposing sanctions against Petitioners, the district court found that "Defense counsel produced many documents relating to this [training] claim. App. 19.

1. Sanctions for Filing Mandatory Disciplinary Charges

During the preparation of the case, Petitioners Fahling, DePrimo, and Brown discovered evidence that Plano's counsel had altered documents filed with the district court. App. 35-37, 39-49. In particular they had

---

[3] The lower court explicitly noted that documents produced pursuant to *subpoenas duces tecum* were related to Plaintiff's excessive force claim. App. 19.

reason to believe an investigation file submitted to the court in response to Plaintiff's motion to compel production of documents had been reconstituted to appear as something it was not,[4] with several documents having been placed in the file that were not in the file when it was produced and reviewed by Petitioners during a deposition. App. 44-45. Plano's counsel never denied these assertions under oath, either in testimony during the two disciplinary hearings or in a responsive affidavit.

Petitioners Fahling, Deprimo, and Brown, in three (3) sworn affidavits, further testified that Officer Hunt's written statement, produced pursuant to court order, was not the same statement that Petitioners had read as part of the 3500 pages of documents produced in response to a *subpoena duces tecum*. Petitioners stated that the statement tendered to the court had been rewritten to expunge damaging admissions and stamped "Attorney Client Privilege."

Notwithstanding Petitioners' unrebutted affidavit testimony, the lower court imposed sanctions on the basis that Petitioners had "*no* basis in fact" to file disciplinary charges, despite the lower court's previous finding that the evidence submitted by the complaining parties was insufficient to support the complaint. App. 45. Prior to

---

[4] The file as originally read and reviewed by Petitioners was an internal affairs investigation report of the incident with Plaintiff that was compiled in the ordinary course of police business. App. 41-42. This report was tendered by Plano along with numerous other internal affairs reports concerning Officer Hunt, and was inside a file folder called "Non-sustained Complaints – Hunt." *Id.* The file folder was part of 3,500 documents produced by Plano, and was at or near the top of the pile as produced by defense counsel. *Id.*

imposing sanctions, the lower court never intimated that the charges were improperly brought.

The lower court sanctioned Petitioners for filing *ex parte* disciplinary charges against defense counsel and "*then* initiat[ing] grievance proceedings on the same grounds with the State Bar of Texas" – all "in order to harass Defendants' counsel." App. 19. The sanction was in the amount of $12,163.00, the total amount requested by Plano. App. 60.

a. The disciplinary charges initiated in the district court and grievance filed with the state bar were mailed out simultaneously

Petitioners did not file disciplinary charges in the district court and then initiate proceedings with the State Bar of Texas. The Action to Commence Disciplinary Proceedings (hereinafter "disciplinary complaint") filed in the lower court and the grievance with the State Bar of Texas were mailed on the same date, October 15, 1997.

b. The local rules for the Eastern District of Texas required that the disciplinary complaint be filed *ex parte* with the lower court

In correspondence sent to the lower court, Petitioner Fahling explained "[i]t is our understanding of [Local Rule 3(d)[5]] that the motion must be submitted *ex parte*,

---

[5] The Local Rules for the Eastern District of Texas were amended effective October 27, 1997. Local Rule 3 relied upon by Petitioners is now Local Rule AT-2(d)(2)(A) which reads: "When it is shown to a judge of this court that a member of this bar has

pending the full Court's determination as to whether disciplinary proceedings should be held." Correspondence from B.Fahling to Judge Brown, October 15, 1997. *See* App. 70 ("Local Rule 3 contemplates notice to the lawyer only '[i]f the court determines that further disciplinary proceedings are necessary.' Accordingly, Plaintiff submits this motion *ex parte*"). Having determined that disciplinary proceedings should be held, Local Rule AT-2(d)(2)(A), the lower court ordered counsel for Mr. Gabriel to serve defense counsel with a copy of the disciplinary complaint. *See* App. 71-72.

c. The factual basis for initiating disciplinary proceedings

Three Petitioners (Fahling, DePrimo, and Brown) initiated disciplinary proceedings against defense counsel based upon their personal knowledge of events and circumstances set forth in their affidavits supporting the action. In short, they testified that the investigation file submitted by Plano pursuant to the lower court's order must have been reconstituted (judging from the court's description of the file and its finding that the contents of the file constituted work product), since several documents in the file submitted to the court were not in the

---

engaged in conduct which might warrant disciplinary action, the judge receiving the information shall bring the matter to the attention of the full court as to whether disciplinary proceedings should be held. If the court determines that further disciplinary proceedings are necessary, the court will notify the lawyer of the charges and give the lawyer an opportunity to show good cause why he should not be suspended or disbarred."

file (Internal Affairs report) when it was produced and reviewed by Petitioners on August 27, 1997.

The same three Petitioners also testified that the statement of Officer Hunt produced by Plano pursuant to the court's October 2, 1997 order was not the same statement that they had reviewed on August 27, 1997.

In March 1998, the grievance committee for the State Bar of Texas determined that there was "insufficient evidence of professional misconduct" by defense counsel and the matter was dismissed. On April 13, 1998, the district court entered an order finding the evidence submitted by Petitioners in the proceeding "insufficient" to support the complaint. The complaint was then dismissed.

2. Sanctions for Refusing to Dismiss Mayor Who Was Named in His Official Capacity

Sanctions were assessed by the district court against Petitioners because they did not voluntarily dismiss the Mayor who was named in his official capacity. App. 13. Petitioners defended their refusal to dismiss the Mayor who had been named in his official capacity with citation to case law indicating that a suit against an official in his official capacity is the same as suing the entity, and because they considered such action to be a "proper and longstanding pleading practice." App. 26-27. The district court imposed sanctions in the amount of $3,775.50, the total amount requested by Plano. App. 60.

3. Sanctions for Written Discovery Requesting the "Same Documents"

Sanctions were also assessed against Petitioners because, said the lower court, they "propounded essentially seven separate sets of discovery requesting the same documents previously requested by and produced to Plaintiff's counsel." App. 14-15. The written discovery was actually propounded before, not after, documents were produced to Plaintiff's counsel during depositions. App. 27-34. Several sets were propounded because Plaintiff sought discovery from each named defendant. The lower court awarded $8,439 in sanctions, the total amount requested by Plano. App. 60.

4. Sanctions for filing "Repetitive Motions"

Petitioners were sanctioned by the district court for "repetitive motions [seeking to obtain the Internal Affairs report on Officer Hunt], which the Court had found in the first instance to be without merit." App. 15. The district court also found, "[a]fter the Court denied Plaintiff's original motion, Plaintiff's counsel repeatedly reurged this motion. . . . " *Id.* The lower court imposed sanctions in the amount of $5,804.50 for these "repetitive motions," the total amount requested by Plano. App. 60.

a. The Internal Affairs file

Officer Hunt's Internal Affairs file first came into the possession of Petitioners when it was produced among the approximately 3,500 documents, discussed *supra*. It contained Internal Affairs investigations of Officer Hunt, including the incident involving Hunt and Plaintiff that

was at issue in this litigation. App. 44-45. This report was part of a file folder marked "Non-Sustained Complaints–Hunt." *Id.* The file folder contained nine or ten reports made pursuant to complaints by citizens, and which were investigated by Internal Affairs.[6] Plano's counsel, upon seeing one of the Petitioners reading the Internal Affairs report regarding the incident with Plaintiff ("Gabriel file"), requested the return of the report, stating that it was privileged, whereupon it was returned with the demand that it be re-produced because, argued Petitioners, it was a discoverable document. App. 42.

b. Motion to compel Internal Affairs report concerning Plaintiff

Because Plano's counsel refused to re-produce the Internal Affairs report which Plaintiff's counsel believed to be discoverable, and because the information it contained was vital to their case, Petitioners moved to compel production of the report. The motion to compel was filed on September 17, 1997, though earlier submissions of the motion had been mailed by Petitioners but not filed by the clerk because they did not comply with the page limitations of the Local Rules.

After the motion to compel was filed on September 17, a subsequent flurry of rulings by the lower court on the earlier submissions by Gabriel resulted in the same motion being filed again. As a result of the lower court's orders which were entered on September 24, the earlier

---

[6] Counsel for Plano did not request that all internal affairs reports be returned, but only the one concerning the incident with Plaintiff.

submissions by Petitioners were filed. Though the motion to compel was filed on September 17 (with the September 8 and 11 submissions being filed by the court on September 24), the lower court erroneously found that "[a]fter the Court denied Plaintiff's original motion [to compel], Plaintiff's counsel repeatedly reurged this motion. . . . " App. 15. The lower court's partial denial of Plaintiff's motion to compel was entered on October 2, 1997,[7] weeks after the motion to compel had been filed.

Petitioners did not reurge the same motion. Rather, on October 20, 1997 they filed a motion to reconsider release of the Internal Affairs report because of new evidence obtained during the deposition of Sgt. Smitheart. App. 45-46. On November 10 the lower court entered an order denying the motion to reconsider release of the statements. No other motions to compel production of the Internal Affairs report were brought.

5. Sanctions for Opposing Motion to Designate Expert Witnesses

The lower court sanctioned Petitioners for responding to Plano's motion for leave to designate expert witnesses regarding attorneys' fees and expenses "by saying that Defendants' motion was 'an untimely exercise in merely symbolic posturing which wastes the Court's time' and was an 'untimely filed frivolous motion.' " App. 16. The motion sought to designate Plano's lead trial counsel as one of the expert witnesses. The lower

---

[7] The lower court denied the motion to compel in part, ordering Plano to produce the statement of Officer Hunt, which was part of the Internal Affairs report.

court imposed sanctions against Petitioners in the amount of $262, the total amount requested by Plano. App. 60.

Petitioners filed a timely memorandum in opposition to Plano's untimely motion, relying upon applicable case law and the Federal Rules of Civil Procedure. In granting Plano's motion, the lower court noted that the motion was "untimely." App. 34-35.

6. Sanctions for Withdrawing Excessive Force Claim

The lower court found Plaintiff's withdrawal of his excessive force claim on the first day of trial to be sanctionable because "Plaintiff's counsel strongly emphasized and urged an excessive force claim . . . [which the court found to] never ha[ve] merit." App. 19-20. In its Amended Conclusion of Law filed on August 24, 1998, however, the district court found that "Plaintiff's claims were not 'frivolous, unreasonable, or groundless.' " App. 22. Sanctions in the amount of $22,376, the total amount requested by Plano, were imposed. App. 60.

The unreasonable seizure claim was one of six causes of action alleged in the Amended Complaint and one of three causes of action alleged in the original complaint. In each complaint, the flagship cause of action was one for free speech. Discovery was sought for police training in four areas: First Amendment rights; identification of public fora; protestor access to public fora; and the use of force.

Withdrawal of the unreasonable seizure claim arose as a result of an admonition by the lower court during the

final pre-trial conference on January 5, 1998, directing Petitioners to "go back and carefully read *Harris v. City of Canton* [sic][8], and any Supreme Court opinion since that case. . . . Before I'm going to go forward on a training claim, you have to bring me some awful strong evidence." App. 50-52.

After "sober reflection upon the Court's explicit advisement," Petitioners withdrew the unreasonable seizure claim, concluding that "each of the remaining five claims had the same common denominator, *i.e.*, the right to future access of the forum at issue for purposes of free speech and literature distribution, while the unreasonable seizure claim stood alone as a past event different in kind from the other five speech-related claims." *Id.*

7. Plano's Time Records

In every instance where the lower court granted sanctions, it imposed the entire amount requested by Plano. App. 20, 60. Plano's counsel submitted only a summary of its fees in support of its request for sanctions; no time records were provided. App. 59-60. The summary provided no detail as to dates and hours, or the type or substance of the work performed, or the attorney who performed the work. The summary contained only the total dollar amount claimed for each matter that Plano sought sanctions. App. 56-58. The amounts sought by Plano ranged from $262 to dismiss the mayor to $22,376 to defend the unreasonable seizure claim. *Id.*

---

[8] *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

THE REASON FOR GRANTING THE WRIT

The Lower Court Decisions were Dramatic Departures from the Accepted and Usual Course of Judicial Proceedings

In an unpublished *per curiam* opinion that is essentially a summary opinion, the Fifth Circuit affirmed the imposition of sanctions against Petitioners by the district court and in so doing the Fifth Circuit endorsed a decision that so far departed from the accepted and usual course of judicial proceedings and was so obviously and injuriously erroneous that an exercise of this Court's supervisory power is called for. *C.f. Gibson v. Lockheed Aircraft Service, Inc.*, 350 U.S. 356, 357, 358 (1956) (Frankfurter, J., concurring) (though rulings by the court of appeals involved ordinary questions which did not warrant granting of a writ, rulings by the court of appeals were "so obviously and injuriously erroneous, 'as to call for an exercise of this court's power of supervision' ").

In imposing $67,820.50 in sanctions against Petitioners, the district court's departure from the accepted and usual course of judicial proceedings was as comprehensive as it is disturbing. The district court sanctioned Petitioners for conduct that clearly is not sanctionable, it assessed sanctions against all Petitioners where all Petitioners clearly were not involved in each of the instances of allegedly sanctionable conduct, it imposed sanctions using erroneous facts as a basis, and it appears that it did not even read Petitioners' response to the sanctions motion because it adopted *in toto* Plano's version of the facts, including the demonstrably false ones pointed out by Petitioners.

Despite the obviously and injuriously erroneous decisions of the district court, the Fifth Circuit, in the only paragraph of its *per curiam* opinion devoted to the merits, stated that the district court's "account enjoys factual support," and that the district court "set forth detailed reasons for each of the sanctions and awarded amounts based on an itemized motion filed by Plano." App. 4. A review of the district court's order reveals precisely the opposite to be true; and when the record is considered as well, there can be no conclusion but that this Court should hold the lower court accountable for this clear departure from the accepted and usual course of judicial proceedings by granting certiorari.

A. The Unpublished Lower Court Decisions are Unsupported by the Record and Existing Law, and are "So Obviously and Injuriously Erroneous 'As to Call for an Exercise of this Court's Power of Supervision' "

The five Petitioners herein were sanctioned as a group without any effort by the lower court or the Fifth Circuit to determine what, if any involvement each had in the six separate instances of alleged misconduct. Indeed, though all Petitioners were sanctioned as though they were one, none of the six instances of conduct for which sanctions were imposed involved all Petitioners, and three of the instances involved only one Petitioner. Petitioner Prescott, for example, merely served in the capacity of local counsel and neither he nor his firm played any role in any of the allegedly sanctionable conduct and Petitioner Fahling did not appear in the case until nine months after it was filed and after some of the allegedly

sanctionable conduct had already taken place. In addition to imposing sanctions without regard to who was responsible for the alleged conduct, it is clear that the district court failed to consider Petitioners' response to the allegations or the record. Relying only upon defendants' assertions, the lower court adopted their factual misstatements and imposed sanctions accordingly. Furthermore, the district court completely failed to abide by the legal standards required by the Fifth Circuit when imposing sanctions under 28 U.S.C. § 1927.

Both the Fifth Circuit and the district court chose not to publish their opinions in this case. The Fifth Circuit's *per curiam* opinion is essentially a summary affirmance insofar as the single paragraph it devotes to the merits consists only of conclusory endorsement of the district court's opinion. Petitioners are not unmindful that this combination of circumstances conspires to make discretionary review by this Court practically non-existent.[9] But in that juridic reality is a compelling argument for granting *certiorari* in this remarkable and disturbing case. Lower courts should not be permitted to decide cases under the theory that they can immunize their decisions from review by this Court simply by not publishing their

---

[9] *See, e.g.*, Richman & Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 283 (1996) ("The limited capacity of the Supreme Court makes it extremely unlikely that it will review an unpublished opinion. After all, a cogent explanation also makes it possible for a reviewing court to understand the case. Without that explanation, the likelihood of discretionary review by an en banc court or by the Supreme Court decreases to the vanishing point").

opinions or by issuing summary affirmances,[10] especially where the district court's opinion is so obviously deficient as in this case.

B. The Two Unpublished Decisions Create a Secret Body of Law Applicable Only to Petitioners

The institutional integrity of the judiciary is significantly compromised when the door to review by this Court can be slammed shut by lower courts simply by their affirming in summary fashion and/or not publishing their decisions. The institutional integrity of the judiciary has been undermined in this case: On their face, the district court's orders imposing $67,820.50 against Petitioners completely fail to meet the Fifth Circuit's own strict requirements for district courts that impose sanctions, *see infra*; and the Fifth Circuit disregarded its own

---

[10] It has been argued that,

> [t]he courts of appeals should limit summary affirmances to cases in which a published opinion below adequately states the grounds of the decision, and then the appellate court should state explicitly that it affirms both the result and the reasoning of the court below. When a court of appeals endorses the reasoning of an unpublished district court opinion, it should order publication of the district court opinion as an appendix to its summary affirmance order. If it does not endorse the reasoning of the district court, the appellate court should prepare and publish a full opinion.

Dragich, *Will the Federal Courts of Appeals Perish if they Publish? Or does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U.L. Rev. 757, 801 (1995) (hereafter, "Dragich, *Perish or Publish?*").

standard of review of substantial sanction awards such as those awarded in this case: "[A]ppellate review of such awards will be inherently more rigorous and such sanctions must be quantifiable with some precision." *Topalian v. Ehrman*, 3 F.3d 931, 937 (1993) (quoting *Thomas v. Capital Security Services*, 836 F.2d 866, 883 (5th Cir. 1988) (*en banc*).[11]

The imposition and affirmance of sanctions in this case is so obviously and injuriously erroneous that it well serves to illustrate why unpublished opinions and summary affirmances breed suspicion:

> Publication . . . serves to hold judges accountable for their opinions. Accountability encourages well-reasoned decisions. When a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin.

Richman & Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 282-283 (1996).

The district court and the Fifth Circuit failed to provide a satisfactory explanation for the sanctions imposed

---

[11] Though *Thomas* dealt only with Rule 11 sanctions, the court stated that "the underlying principles elucidated in *Thomas* in the context of Rule 11 apply across-the-board to all of the district court's sanction powers." *Topalian*, 3 F.3d at 936 n. 5.

against Petitioners because there is no satisfactory explanation to provide. The Fifth Circuit's unpublished opinion in this case, therefore, presents an extreme example of why an "[a]ppellate court practice[ ] that create[s] a 'secret' body of law of questionable precedential value, and that provide[s] wholly inadequate guidance to district court judges, lawyers, and citizens [is] misguided and destructive." Dragich, *Perish or Publish?* 44 Am. U.L. Rev. 757, 802; *compare with United States v. Jolly*, 493 F.2d 672, 676 (2d Cir. 1974) (stating that summary affirmances have no stare decisis effect due to potential for development of "secret law" inherent in use of decisions alone without court's supporting reasoning).

One Circuit Court of Appeals has squarely responded to these all too real concerns about the secret body of law that develops from unpublished opinions.[12]

In *Anastasoff v. United States*, 223 F.3d 898, 2000 LEXIS 21179 (8th Cir. 2000), the Eighth Circuit rejected the appellant's claim that it was not bound by an unpublished opinion directly on point (which was not precedent under the rules of the Eighth Circuit) that would have decided the case against the appellant. The Court held that the portion of the circuit rule that declares that unpublished opinions are not precedent is unconstitutional because it purports to confer on the federal courts a power that goes on beyond the "judicial." 2000 LEXIS 21179 at **3-4. The circuit court did not think

---

[12] Local Rule 47.5.4 of the Fifth Circuit Rules provides:

> Unpublished Opinions Issued on or After January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel, or law of the case . . . "

it enough to say it does not have sufficient time to do a decent enough job to justify treating every opinion as a precedent, stating "if this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only." *Id.* at **20-21.

The Fifth Circuit's treatment of this case is unmistakable evidence that the judicial system is in trouble and is in need of significant correction by this Court. How else can the Fifth Circuit's complete disregard of its own precedent in favor of creating an underground body of law good for one place and time only be explained?

ARGUMENT

The Fifth Circuit Failed to Adhere to Its Own Standard of Rigorous Review of 28 U.S.C. § 1927 Sanctions

This challenge is, in essence, to the "underground body of law good for one place and time only" that was created by the Fifth Circuit when it affirmed, by unpublished opinion, the district court's unpublished decisions which are manifestly contrary to the Fifth Circuit's legal standards regulating imposition of sanctions under 28 U.S.C. § 1927. And it is an underground body of law that is so obviously and injuriously erroneous that this Court should exercise its supervisory power.

In affirming the district court's orders, the Fifth Circuit failed to adhere to its own standards as they pertain to review of an appeal of a district court's imposition of sanctions that are substantial in amount. That legal standard provides that "appellate review of such awards will

be inherently more rigorous and such sanctions must be quantifiable with some precision." *Topalian v. Ehrman*, 3 F.3d 931, 937 (quoting *Thomas v. Capital Security Services*, 836 F.2d 866, 883 (5th Cir. 1988) (*en banc*). It is clear in reading the Fifth Circuit's *per curiam* opinion that it did not engage in a "rigorous review" of the district court's orders. And it affirmed sanctions that fell far short of being "quantifiable with some precision." The Fifth Circuit's review of the decisions imposing $67,820.50 in sanctions against Petitioners consisted of the following:

> The district court's account enjoys factual support and its legal basis was not in error. Moreover, it set forth detailed reasons for each of the sanctions and awarded amounts based on an itemized motion filed by Plano. That it rejected sanctioning Gabriel's attorneys for most of the complained-of conduct indicates that it sanctioned them only when § 1927 sanctions were required.

App. 4. This is not only not a rigorous review – it is no review at all. It is the obvious nature of the Fifth Circuit's departure from its own law that makes this case particularly troubling. The district court erred at every turn in its decisions, and did so in dramatic fashion. The Fifth Circuit's summary affirmance is therefore all the more inexplicable.

The Fifth Circuit failed to conduct a rigorous review, and the district court ignored the strict requirements of the Fifth Circuit when it imposed sanctions against Petitioners. The Fifth Circuit's requirements for district courts that impose sanctions under 28 U.S.C. § 1927 are found in the body of law set forth in published opinions. That law demands that district court's provide "very

specific factual bases from which [the Fifth Circuit] may conduct [their] duty of 'rigorous' review for abuses of the district court's decision." *Topalian*, 3 F.3d at 936. There are four factors that must be reflected in the "very specific factual bases" of a trial court's findings where the sanctions imposed are substantial in amount. In its specific factual findings the district court must: 1) announce the sanctionable conduct giving rise to its order; 2) demonstrate some connection between the amount of monetary sanctions imposed and the sanctionable conduct by the violating party; 3) consider whether the costs or expenses were reasonable as opposed to self-imposed, mitigatable, or the result of delay in seeking court intervention; 4) demonstrate the sanctions are not vindictive or overly harsh reactions to objectionable conduct, and that the amount and type of sanction was necessary to carry out the purpose of the sanctioning provision.[13] *Id.* at 937.

The district court imposed sanctions on all five Petitioners for six instances of conduct but failed in each case to identify what specific conduct by each of the five Petitioners was sanctionable. As the Fifth Circuit

---

[13] The lower court in *Topalian* had awarded sanctions against the plaintiffs for filing a motion for sanctions against the defendants for their failure to produce documents that the court had previously ordered did not need to be produced; by responding late or not at all to motions for discovery; by being uncooperative in the discovery process; by continually rescheduling or canceling depositions at the last minute; by failing to produce witnesses for depositions after those depositions had lasted past a certain time period; by being uncooperative and argumentative at depositions; by appearing in court late on at least one occasion; and by offering frivolous and time-consuming arguments for his lack of diligence in pursuing the litigation. 3 F.3d at 934.

observed in finding that all the Petitioners intended to appeal the sanctions order, "[t]he district court's sanctions order does not distinguish among [the Petitioners]. App. 4.

A. The district court relied upon plainly erroneous facts by adopting *in toto* the factual misrepresentations of Plano

The district court also misstated facts on a number of occasions and relied upon those misstated facts to impose sanctions against Petitioners. For example, the district court assessed sanctions against Petitioners for propounding "essentially seven separate sets of discovery requesting the same documents previously requested by and produced to Plaintiff's counsel." App. 14-15. In fact, the documents requested were not produced until *after* the discovery had been propounded. Moreover, the seven sets of discovery were requests for admissions, interrogatories, and requests for production served on each named defendant. App. 27-34.

Further factual misstatements were made by the district court when it found that "Plaintiff's counsel [ ] repeatedly filed motions with the Court to obtain Defendants' investigative file, which the Court determined to be work product." App. 15. The "repetitive motions" referred to by the lower court were in fact only two different motions seeking the Internal Affairs report about the Gabriel incident – the first a motion to compel production and for sanctions; the second, a motion to reconsider the court's denial based upon new evidence. App. 39-49.

The district court again misstated the facts when it sanctioned Petitioners for filing *ex parte* disciplinary charges against defense counsel and "then initiat[ing] grievance proceedings on the same grounds with the State Bar of Texas" – all "in order to harass Defendants' counsel." App. 18-19. Petitioners Green, Fahling, DePrimo, and Brown did not act with an improper purpose in initiating the disciplinary complaint *ex parte*. Indeed, in correspondence sent to the lower court along with the complaint, counsel explained, "[i]t is our understanding of [Local Rule 3(d)] that the motion must be submitted *ex parte*, pending the full Court's determination as to whether disciplinary proceedings should be held." Correspondence from B.Fahling to Judge Brown, October 15, 1997 ("Local Rule 3 contemplates notice to the lawyer only '[i]f the court determines that further disciplinary proceedings are necessary.' Accordingly, Plaintiff submits this motion *ex parte*"). App. 70.

The lower court's finding that "Plaintiff's counsel had no basis in fact for contending that defense counsel had falsified any document," App. 19, is also a misstatement of fact. The disciplinary proceedings were initiated based upon the personal knowledge of events and circumstances set forth in detailed affidavits supporting the action. The lower court's finding that after filing the complaint in the lower court, "Plaintiff's counsel then initiated grievance proceedings before the State Bar of Texas" is wrong as well. *Id.* The filings with the lower court and the State Bar were mailed out on the same date, October 15, 1997.

B. The district court ignored its previous factual findings and legal conclusions

The district court's finding that there was "no basis in fact" for the complaint against defendants' counsel is likewise undermined by the court's own actions when it ordered Plaintiffs' counsel to serve defense counsel with a copy of the disciplinary complaint, App. 71-72, and then conducted further proceedings on the matter April 7, 1998. Service of the complaint to notify the lawyer concerned and conducting a hearing on the matter are required only,

> [w]hen it is shown to a judge of this court that a member of this bar has engaged in conduct which might warrant disciplinary action, the judge receiving the information shall bring the matter to the attention of the full court as to whether disciplinary proceedings should be held. *If the court determines that further disciplinary proceedings are necessary, the court will notify the lawyer of the charges and give the lawyer an opportunity to show good cause why he should not be suspended or disbarred.*

Local Rule AT-2(d)(2)(A) (emphasis provided) (this is former Local Rule 3(d) in effect at the time counsel initiated their complaint. The Local Rules for the Eastern District of Texas were amended effective October 27, 1997). Furthermore, in an order dated April 13, 1998, the lower court did not find that there was no basis in fact for the complaint, but rather, that "the evidence submitted by the complaining parties is insufficient to support the complaint." If the lower court had believed there was "no basis in fact" for counsels' complaint against Plano's

counsel it would not have ordered him to be notified, but instead would have taken no action on the matter.

The lower court found abandonment of the excessive force claim on the first day of trial to be sanctionable because "Plaintiff's counsel strongly emphasized and urged an excessive force claim . . . [which the court found to] never ha[ve] merit." App. 19.

The decision to abandon the unreasonable search claim was prompted by the lower court's comments to counsel at the final pre-trial conference on January 5, 1998, when it directed counsel to "go back and carefully read *Harris v. City of Canton*, and any Supreme Court opinion since that case. . . . Before I'm going to go forward on a training claim, you have to bring me some awful strong evidence." After "sober reflection upon the Court's explicit advisement," by counsel the unreasonable seizure claim was abandoned. App. 50-52.

Moreover, defendants failed to bring any dispositive motions against the claim. If the claim was so clearly lacking in merit, why did Plano fail to pursue any dispositive motions against it? *See FDIC v. Calhoun*, 34 F.3d 1291 (5th Cir. 1994) (Fifth Circuit was "puzzled by defendant's failure to bring any dispositive motions . . . [i]f the legal issues raised by the[ ] defenses were so obvious and meritorious that failure to research them is sanctionable, what is [defendant's] excuse for failing to pursue them?"). Finally, in its Amended Conclusions of Law filed on August 24, 1998, the lower court found that "Plaintiff's claims were not 'frivolous, unreasonable, or groundless," and denied Plano's request for attorneys' fees. App. 22.

C. Sanctions were awarded despite the complete absence of billing records

The district court granted the full amount of fees requested by Plano for each of the six claims on which sanctions were imposed. Plano's documentation of its fee request consisted of an affidavit by Plano's counsel wherein he set forth the sum total of fees "incurred due to the conduct of Plaintiff's counsel in this case" together with his hourly rate and that of three junior attorneys who worked on the case. App. 56-58. The only other document submitted by Plano was a summary of legal fees which set forth a sum total for each section in the brief wherein it set forth its grounds for requesting sanctions. App. 59-60. No statement of hours claimed or break down of hours worked was provided and no indication of what work each attorney did or how many hours were billed was given. The lack of detail provided no basis to determine what portion of the fees requested were incurred because of the § 1927 violations alleged.

The absence of specificity in district court orders awarding fees results in reversals by the Fifth Circuit. For example, it reversed an award of attorneys' fees where, "although claims were supported by affidavits, '[n]either firm submitted sufficiently detailed information from which the district court could determine what portion of the[ ] fees were incurred because of Rule 11 violations.' " *Willy v. Coastal Corp.*, 855 F.2d 1160, 1173 (5th Cir.1988). The district court's orders in this case clearly lacked the specificity required in fee awards and should have been summarily reversed by the Fifth Circuit; instead, a secret body of law was created for Petitioners alone.

D. The district court failed to demonstrate that sanctions were necessary to carry out the purpose of § 1927

It is settled "that district courts must demonstrate that sanctions are not vindictive or overly harsh reactions to objectionable conduct, and that the amount and type of sanction was necessary to carry out the purpose of [§ 1927]." *Topalian*, 3 F.3d at 937.

The order of the lower court imposing sanctions was without question an overly harsh reaction to conduct by counsel for Mr. Gabriel that the court clearly did not like, especially the filing of disciplinary charges against Plano's counsel. This conclusion is unavoidable in light of the district court's reiteration in its order of Plano's counsels' charge that the filing of the ethics complaint was the "most egregious conduct." App. 18-19. The district court also devoted a number of paragraphs to language employed by some of the Petitioners in communications with Plano. App. 8-10. It is clear that the district court took offense at the language since that portion of the court's order is by far the most specific, even though the district court did not purport to sanction Petitioners for the language the court found objectionable. Moreover, the district court appears not to have considered at all Petitioners' affidavits and response to the motion for sanctions. If it had, Petitioners would not have been sanctioned.

Furthermore, just as the district court did in *Aiken v. Q-L Investments, Inc.*, 959 F.2d 521 (5th Cir. 1992), the lower court "did not state in the record which alternative sanctions, if any, it [ ] considered. . . . Above all, it did not explain why the sanction it imposed was the least severe

sanction adequate to serve the purpose of [§ 1927]." 959 F.2d at 535; *see also Topalian*, 3 F.3d at 938 ("the trial court's findings contain no analysis as to whether these sanctions are the least severe sanctions adequate to accomplish the purpose for which the sanction was imposed") (citing *Thomas*, 836 F.2d at 878). The requirement that district courts explain why the sanction imposed was the least severe "serves a critical function: it ensures that [§ 1927] does not degenerate into nothing more than a docket control device that the district courts use to punish unsuccessful litigants who dare to raise their claims or defenses in federal court." *Id.*

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STEPHEN M. CRAMPTON*
Chief Counsel
AMERICAN FAMILY ASSOCIATION
CENTER FOR LAW & POLICY
P.O. Drawer 2440
Tupelo, MS 38803
(662) 680-3886

**Counsel of Record*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40928
Summary Calendar

MARK HARRY GABRIEL,

Plaintiff-Appellant,

versus

CITY OF PLANO; ET AL

Defendants,

CITY OF PLANO; MARK HUNT, in his official capacity as City of Plano police officer; TERRY PAULEY, in his official capacity as City of Plano Police Department; ROBERT LEITZ, in his official capacity as City of Plano police officer,

Defendants-Appellees.

No. 00-40021
Summary Calendar

MARK HARRY GABRIEL,

Plaintiff,

versus

CITY OF PLANO; ET AL

Defendants,

CITY OF PLANO; MARK HUNT, in his official capacity as City of Plano police officer;

TERRY PAULEY, in his official capacity
as City of Plano Police Dept;
ROBERT LEITZ, in his official capacity
as City of Plano police officer,

Defendants-Appellees,

versus

BRUCE W. GREEN; BRIAN FAHLING; MICHAEL J. DEPRIMO; BRYAN J. BROWN; PHIL PRESCOTT,

Appellants.

Appeals from the United States District Court
For the Eastern District of Texas
(4:96-CV-362)
(Filed June 13, 2000)

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:[1]

These appeals concern sanctions issued pursuant to 28 U.S.C. § 1927 against the attorneys of the plaintiff, Mark Harry Gabriel. Because we find that the district court's awards were not an abuse of discretion, we AFFIRM the awards.

Gabriel brought an action under 42 U.S.C. § 1983 against the City of Plano, the mayor, and several police

---

[1] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

officers for alleged abridgements of his right to free speech. The police had removed Gabriel, an anti-abortion protester, from a public area near a local high school.

The litigation apparently became uncivil early on. The behavior by Gabriel's counsel relevant to this appeal included repeated requests for document discovery; the filing of an opposition to Plano's motion for leave to designate expert witnesses; and the filing of disciplinary charges against one of the attorneys for Plano. Two issues also arose regarding allegedly frivolous claims: Gabriel's attorneys' failure to dismiss Plano's mayor, who had been sued only in his official capacity and had no involvement with the incident; and the failure to abandon an excessive force claim until the first day of trial.

After a bench trial in which the district court found the claims to be without merit, the defendants moved for sanctions for 16 different acts by Gabriel's attorneys. The district court granted the motion regarding six of the alleged acts, for a total sanction of $52,820.50. The court also noted that fees were available for the City's preparation of the motion, and after the City sought clarification of an amount, the court awarded $15,000 for preparation time. Gabriel timely appealed both awards.

We first address whether we may hear this appeal on behalf of all the appellants. While the first appeal was brought in Gabriel's name, the appeal is actually on behalf of his five attorneys. Even if a notice of appeal does not list the parties who actually intend to appeal, it is sufficient if it is objectively clear that a party intended to appeal. *See* FED. R. APP. P. 3(c) advisory committee's note to 1993 Amendments (2000). In *Garcia v. Wash*, we

held that a notice of appeal of sanctions was sufficient where only the attorney, not the litigant himself, received sanctions. 20 F.3d 608, 610 (5th Cir. 1994).

We find that it is clear that all of Gabriel's attorneys intended to appeal the order. The district court's sanctions order does not distinguish among them. As Gabriel was not a sanctioned party, it is obvious that his attorneys and not Gabriel are the actual appellants.

Turning to the merits, we find no abuse of discretion in the district court's awards of sanctions. Sanctions under § 1927 are allowed for actions that are both unreasonable and vexatious. *See Edwards v. General Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998). The district court's account enjoys factual support and its legal basis was not in error. Moreover, it set forth detailed reasons for each of the sanctions and awarded amounts based on an itemized motion filed by Plano. That it rejected sanctioning Gabriel's attorneys for most of the complained-of conduct indicates that it sanctioned them only when § 1927 sanctions were required.

Gabriel's attorneys raise no specific challenge to the award for the preparation of the City's motion, and we find no error in it.

AFFIRMED AS TO BOTH APPEALS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK HARRY GABRIEL Plaintiff, v. CITY OF PLANO, TEXAS OFFICER MARK HUNT, in his official capacity as a member of the City of Plano Police Department; OFFICER TERRY PAULEY, in his official capacity as a member of the City of Plano Police Department, and OFFICER ROBERT LEITZ, in his official capacity as a member of the City of Plano Police Department Defendants.	§ § § § § § § § § § § § § § § § § §	Civil Case No. 4:96CV362

ORDER CLARIFYING COURT'S JULY 20, 1999 ORDER

(Filed Nov. 29, 1999)

The Court, having considered Defendants' Motion to Clarify Court's July 20, 1999 Memorandum and Opinion Order and any response thereto, is of the opinion that the motion should be **GRANTED.**

It is therefore **ORDERED**, that Plaintiff's Counsel having been sanctioned as previously ordered should pay the additional sum of $15,000.00 to Defendants for their attorneys' fees and expenses incurred in the preparation,

filing and prosecution of the Motion for Sanctions. **SIGNED** this 29 day of November, 1999.

/s/ Paul Brown
PRESIDING JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK HARRY GABRIEL	§	
Plaintiff,	§	4:96cv362
	§	
v.	§	
CITY OF PLANO, et al.	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Jul. 20, 1999)

On December 28, 1998, the Court held a hearing on Defendants' Motion for Sanctions and Award of Attorneys' Fees. Since this hearing the Court has carefully considered all of the argument of counsel, has carefully reviewed the record in this case, and has considered all the briefs and affidavits filed by the parties in support of their respective positions, and has concluded that the motion should be granted in part and denied in part.

BACKGROUND

The litigation which spawned the present motion originated with the filing of a complaint by Mark Harry Gabriel ("Gabriel") against the City of Plano, John Longstreet, in his Official Capacity as Mayor of City of Plano, and Mark Hunt, Terry Pauley, and Robert Leitz, in their Official Capacities as City of Plano police officers, in the Northern District of Texas, alleging various causes of action including a denial of his right of free speech and

the use of excessive force in restraining Plaintiff. This cause of action was transferred to the docket of this Court on November 6, 1996. In August and September of 1996, Gabriel, who is a street preacher, selected the areas surrounding R. C. Clark High School in Plano, Texas, as a venue for sharing his anti-abortion and religious messages with students. The area selected by Gabriel included an area along Springcreek Parkway, which is directly in front of the high school. Plaintiff alleged that on August 27 and 28 and September 3, 1996, City of Plano police officers interfered with the exercise of his First Amendment rights as he stood in various public rights of way near R. C. Clark High School. Plaintiff sought a declaratory judgment that Defendants' actions were unconstitutional and injunctive relief.

The litigation was contentious from the very beginning. No action could be agreed to or go unchallenged by the attorneys. The growing animosity between them became obvious at an early date. The language used by Plaintiff's counsel in their submissions to the Court and in their correspondence with defense counsel was, at times, inflammatory and unprofessional. The Court has found many examples of such language in the record, but will cite only the following as representative:

> Your blatant misrepresentations to the Court, in an apparent effort to save your own skin by unjustly accusing Plaintiff's counsel of egregious misconduct, cannot and will not be tolerated. . . . [Y]ou certified to the Court that the facts on which this argument was based are true, although you knew that the truth was otherwise. (Letter dated September 23, 1997, from

Plaintiff's counsel, Brian Fahling, to David J. LaBrec, Defendants' counsel.)

Advancing such an argument as a rationale to deny the Plaintiff an expedited hearing is a facially insincere, vexatious, and frivolous action portraying a lack of respect for the Court and the constitutional rights at stake in the preliminary relief process. (Page 2, Plaintiff's Response to Defendants' Motion for Extension of Time to Respond to Plaintiff's Motion for Injunction and Memorandum in Support.)

Such infantile nitpicking . . . (Page 3, footnote 1, Plaintiff's Response to Defendants' Motion for Extension of Time to Respond to Plaintiff's Motion for Injunction and Memorandum in Support.)

Such time has now passed as needed to draft a response or, in the alternative, locate more capable counsel. (Page 4, Plaintiff's Response to Defendants' Motion for Extension of Time to Respond to Plaintiff's Motion for Injunction and Memorandum in Support.)

Even if Defendants have been unable to secure counsel capable of grasping the issues presented in the Memorandum of Law, Defendants have had more than enough time to answer . . . (Page 4, Plaintiff's Response to Defendants' Motion for Extension of Time to Respond to Plaintiff's Motion for Injunction and Memorandum in Support.)

Thus, while Defendants may need time to secure representation capable of drafting a response to the allegedly "complicated" and "exhaustive law" in the Memorandum, Defendants should not be given any further extension

> of time . . . (Page 5, Plaintiff's Response to Defendants' Motion for Extension of Time to Respond to Plaintiff's Motion for Injunction and Memorandum in Support.)
>
> By suggesting such a time delaying-procedure Defendants demonstrate an egregious level of disregard for Plaintiff's right to present his case before this Honorable Court, and seek to have the Court sanctify Defendants' insincere and frivolous motion practice. (Page 5, footnote 3, Plaintiff's Response to Defendants' Motion for Extension of Time to Respond to Plaintiff's Motion for Injunction and Memorandum in Support.)

This type of rhetoric by Plaintiff's counsel was responded to forcefully by Defendants' counsel, who is a very experienced attorney in defending this type of litigation. Plaintiff's counsel accused Defendants' counsel of engaging in unethical conduct, in violation of the rules of this Court and the rules of the State Bar of Texas. Defense counsel was found by this court, as well as by the State Bar of Texas, not to have violated any Rule of Professional Conduct.

This contentious conduct continued up to and through trial. After a two-day bench trial, the Court found plaintiff's claims to be without merit. Following the trial, Defendants' counsel submitted a motion for sanctions pursuant to 28 U.S.C. § 1927 seeking to recover their attorneys' fees allegedly attributable to unreasonable and vexatious litigation tactics pursued by Plaintiff's counsel. In response, Plaintiff filed a motion for Rule 11 sanctions, claiming that Defendants' motion was predicated on a misreading of the law, misinterpretation of the

record, and miscasting of Plaintiff's intent. At the conclusion of the hearing on the two motions held on December 28, 1998, the Court denied Plaintiff's motion for Rule 11 sanctions and took Defendants' motion under advisement.

SANCTIONS UNDER 18 U.S.C. § 1927

Section 1927 provides:

> Any attorney . . . who so multiplies proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The Fifth Circuit, finding this provision penal in nature, strictly construes its language. *Edwards v. General Motors, Inc.*, 153 F.3d 242, 246 (5th Cir. 1998). Part of this construction is that an attorney's conduct must be both unreasonable and vexatious to merit sanctions. *Id.* The Fifth Circuit in *F.D.I.C. v. Conner*, 20 F.3d 1376, 1384 (5th Cir. 1994) stated the standard for imposing § 1927 sanctions as follows:

> Before a sanction under § 1927 is appropriate, the offending attorney's multiplication of the proceedings must be both "unreasonable" and "vexatious." We have characterized awards under this statute as penal in nature. *Browning v. Kramer*, 931 F.2d 340, 344 (5th Cir. 1991). Other courts have written that § 1927 should be employed "only in instances evidencing a 'serious and standard disregard for the orderly process of justice.' " *Dreiling v. Peugeot Motors of America, Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985)

> (quoting *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968), *cert. denied*, 395 U.S. 908, 89 S.Ct. 1750, 23 L.Ed.2d 221 (1969)); *see also United States v. Ross*, 535 F.2d 346, 349 (6th Cir. 1976) (§ 1927 liability should "flow only from an intentional departure from proper conduct, or, at a minimum, from a reckless disregard of the duty owed by counsel to the court."). Such a strict construction of § 1927 is necessary "so that the legitimate zeal of an attorney in representing her client is not dampened." *Browning*, 931 F.2d at 344.

An analysis of an attorney's actions made pursuant to § 1927 is governed by an objective standard. It is not a subjective probing of the attorney's mind. *Coghlan v. Starkey*, 852 F.2d 806, 814 (5th Cir. 1988).

DISCUSSION

Defendants contend that Plaintiff's counsel's conduct with respect to 16 different matters unreasonably and vexatiously multiplied the proceedings so as to cause excess costs, expenses and attorneys' fees. This conduct is identified in paragraphs A through P of Defendants' brief in support of their motion for sanctions. The Court will discuss Defendants' contentions in the order in which they are presented in the motion.

Paragraph A

Defendants' counsel contends that Plaintiff's counsel's refusal to grant an extension of time in which Defendants could answer the complaint and the manner in

which defense counsel opposed the granting of an extension is sanctionable. While the language used by Plaintiff's counsel was unprofessional, sarcastic, and, in fact, insulting to defense counsel, the Court is not persuaded that the conduct rises to the level sanctionable under § 1927.

Paragraph B

Defense counsel contends that Plaintiff's counsel unreasonably refused to dismiss John Longstreet as a defendant because he was only sued in his official capacity as Mayor of the City of Plano, and Plaintiff's complaint made no factual allegation against Mayor Longstreet. Defense counsel requested that the Mayor be dismissed, but Plaintiff refused. The Court finds this action by Plaintiff's counsel unreasonable and vexatious, which necessitated defense counsel filing a motion to dismiss Mayor Longstreet. This conduct is sanctionable.

Paragraph C

Defendants complain that Plaintiff's counsel did not comply with a subpoena duces tecum issued to Plaintiff on July 9, 1997. Defendants had requested that Plaintiff bring several documents, including a copy of any diaries covering his activities from the period from August 27, 1996, to July 9, 1997. Plaintiff appeared without any of the requested documents and Plaintiff advised that he had never seen the subpoena prior to the date of the deposition. It appears to the Court that Plaintiff's counsel should have had Plaintiff produce the diary for the deposition, but this is essentially a discovery dispute, and

while it might well have been sanctionable under Rule 37 of the Federal Rules of Civil Procedure, the Court does not consider that it is something that is sanctionable under § 1927.

Paragraph D

Defendants complain that Plaintiff did not produce documents required by the initial disclosures, which necessitated Defendants filing a motion to compel the production of Plaintiff's disclosures. Again, this is a discovery dispute which might have justified sanctions at the time, but the Court does not believe that it justifies sanctions under § 1927 at this late date.

Paragraph E

Defendants complain that Plaintiff sought discovery not permitted by the Court's Docket Control Order which necessitated Defendants filing a motion for protective order and motion to quash Plaintiff's discovery. The Court granted Defendants' motion. The Court does not believe that this dispute supports the imposition of sanctions under § 1927.

Paragraph F

Defendants contend that Plaintiff's counsel propounded essentially seven separate sets of discovery requesting the same documents previously requested by and produced to Plaintiff's counsel, making the discovery unreasonably cumulative and duplicative. While this is a

discovery matter that could have been more appropriately addressed at the time with appropriate sanctions, the Court is persuaded that it was so unreasonable for Plaintiff's counsel to make this request and to continue to insist on their production that it does rise to the level of conduct sanctionable under § 1927.

Paragraph G

Defendants' counsel produced approximately 3500 pages of documents in response to Plaintiff's deposition notice and subpoena duces tecum to the parties. After these documents were produced, Plaintiff's counsel asked for time to privately review the documents before the continuation of depositions. When defense counsel returned to the room, they found Plaintiff's counsel reviewing privileged work product documents that had somehow been obtained by Plaintiff's counsel. Upon demand by defense counsel, the documents were returned to Defendants' counsel. Plaintiff's counsel then repeatedly filed motions with the Court to obtain Defendants' investigative file, which the Court determined to be work product. After the court denied Plaintiff's original motion, Plaintiff's counsel repeatedly reurged this motion, each time making derogatory references to Defendants and their counsel. Plaintiff's counsel implied to the Court that Defendants' counsel was misrepresenting the origin of the work product file. These repetitive motions, which the court had found in the first instance to be without merit, multiplied this litigation and caused Defendants considerable additional expense. This conduct is sanctionable under § 1927.

Paragraph H

On September 4, 1997, Defendants filed a motion for leave to designate expert witnesses regarding attorneys' fees and expenses. This motion was filed in accordance with the Court's docket control order and the local rules of this Court. Plaintiff's counsel responded by saying that Defendants' motion was "an untimely exercise in merely symbolic posturing which wastes the Court's time" and was an "untimely filed frivolous motion." Defendants' motion was no such thing. Defendants had requested attorneys' fees in their original answer and by filing the request to designate expert witnesses, were complying with the Court's rules. This conduct is sanctionable under § 1927.

Paragraph I

Defendants complain of Plaintiff's filing a motion for leave to file an amended complaint within less than two weeks of the deadline to file the joint pretrial order and three weeks of the trial date. Defendants filed objections in response to Plaintiff's motion for leave to file amended complaint. Plaintiff filed a motion to strike, alleging that the objections should be stricken for violating the Court's local rule requiring no smaller than 12 point type. Plaintiff's counsel's conduct was obviously petty and their subsequent action in filing an unedited complaint and then a motion to withdraw the unedited complaint at a minimum would demonstrate a lack of attention. However, the Court does not find any of this conduct as meeting the standard for imposition of sanctions under § 1927.

Paragraph J

Defendants complain that Plaintiff served the Plano City Secretary with a subpoena compelling her attendance at trial for the production of numerous documents. Defendants complain that these documents had already been furnished. Plaintiff responds by saying that they needed her to authenticate the documents. Plaintiff could have asked defense counsel to stipulate as to the documents' authenticity, but since they were involved in litigation tactics that did not involve the seeking of agreements with opposing counsel, the documents did have to be authenticated. The Court does not find that the issuance of this subpoena under these circumstances meets the requirements for sanctions under § 1927.

Paragraph K

Defendants complain that Plaintiff's filing a motion for continuance seven days before trial served to complicate and prolong this litigation. The Court granted this motion for continuance. While the motion for continuance certainly did prolong the litigation, the Court does not believe that the filing of the motion was unreasonable and vexatious within the meaning of § 1927.

Paragraph L

Defendants complain of the filing on October 14, 1997, by Plaintiff's counsel of a motion in Limine to exclude Plaintiff Gabriel's sidewalk counseling log from evidence. Defendants contend that this motion in limine was unnecessary, since the trial was going to be before

the Court. The court is not persuaded that this conduct meets the standard for the imposition of sanctions under § 1927.

Paragraph M

Plaintiff filed an offer of judgment pursuant to Article Six of this Court's Civil Justice Expense and Delay Reduction Plan which had been expressly disapproved by the Fifth Circuit prior to the filing of the motion in *Ashland Chemical, Inc. v. Barco, Inc.*, 123 F.3d 261 (5th Cir. 1997). The Court does not find this conduct sanctionable under § 1927.

Paragraph N

The Defendants complain of the lack of cooperation of Plaintiff in the preparation of the final pretrial order in this case, which necessitated the Defendants having to file their portion of the pretrial order without the benefit of input from the counsel for plaintiff. While Plaintiff's counsel's conduct is not acceptable in this Court, the Court is not persuaded that it is sanctionable under § 1927.

Paragraph O

Defendants claim that Plaintiff's counsel's most egregious conduct began with the forwarding of Plaintiff's motion for sanctions pursuant to Federal Rule of Civil Procedure 11 to Defendants' counsel on September 23, 1997. Plaintiff's counsel did not file this motion, but instead filed disciplinary charges against David J. LaBrec,

one of Defendants' attorneys, asserting gross misconduct with regards to the refusal to produce and later production of an allegedly falsified document from an investigative file. Plaintiff's counsel filed the disciplinary complaint ex parte with the Court and did not serve Mr. LaBrec with a copy. Plaintiff's counsel then initiated grievance proceedings on the same grounds before the State Bar of Texas. The Court finds that Plaintiff's counsel had no basis in fact for contending that defense counsel had falsified any document. Furthermore, Plaintiff's counsel had no basis in fact to contend that this file should have been produced and that Plaintiff was guilty of misconduct in not producing the file. The Court finds that these disciplinary charges filed during the course of this litigation were filed in order to harass Defendants' counsel and defense counsel was put to considerable expense and inconvenience in defending these allegations. The Court finds that this conduct is sanctionable under § 1927.

Paragraph P

Throughout the pendency of this case Plaintiff's counsel strongly emphasized and urged an excessive force claim. On the first day of trial Plaintiff's counsel announced the excess force claim was being abandoned. The Court finds that the claim never had merit. Defense counsel produced many documents relating to this claim and conducted discovery in preparation to defend the claim, as well as made other preparations for the defense of the claim. This conduct of Plaintiff's counsel clearly meets the standard for sanctions under § 1927.

Defendants contend that they should recover their expenses, costs, and attorneys' fees in filing and prosecuting the motion for sanctions under § 1927. The Court concurs that Defendants should recover some of their attorneys' fees and costs expended in the preparation, filing, and prosecution of this motion.

Defendants have submitted to the Court in support of their motion an affidavit and billing records detailing the fees and expenses incurred as a result of the conduct identified in each of the Paragraphs A through P. The evidence submitted by Defendants supports a finding by the Court that such expenses were reasonable and necessary. A summary of these expenses is attached as Exhibit A-1 to Defendants' brief in support of their motion for sanctions. Defendants should recover the fees and expenses associated with the conduct identified in Paragraphs B, F, G, H, O, and P totaling $52,820.50.

CONCLUSION

Plaintiff contends that Plaintiff's counsel's conduct in this case represents only zealous advocacy that should be encouraged and that to sanction Plaintiff's counsel would have a chilling effect on civil rights litigation. The Court disagrees. Plaintiff's counsel's conduct evidenced a serious disregard for the orderly process of justice. It was at minimum reckless and multiplied and extended the proceedings in this case. The Court is not persuaded that the imposition of sanctions in this case will dampen the legitimate zeal of an attorney in representing his client. Plaintiff's counsel should be sanctioned in the amount of $52,820.50. This sanction should be paid by Plaintiff's

counsel to Defendants on or before 15 days from the date of the signing of this Order.

IT IS SO ORDERED.

SIGNED this 20th day of July, 1999.

/s/ Paul Brown
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK HARRY GABRIEL Plaintiff, v. CITY OF PLANO, et al. Defendants.	§ § § § § § §	4:96cv362

AMENDED CONCLUSION OF LAW

(Filed Aug. 24, 1998)

On August 11, 1998, the Court made findings of fact and conclusions of law in the above-styled case. For the purpose of clarification, conclusion of law number 17 should be amended to read as follows:

Attorneys' Fees

17. Prevailing defendants cannot recover fees under 42 U.S.C. § 1988 without demonstrating that the plaintiff's underlying claim was frivolous, unreasonable or groundless. *Hidden Oaks Ltd. v. City of Austin,* 138 F.3d 1036, 1053 (5th Cir. 1998). Plaintiff's claims were not "frivolous, unreasonable or groundless." Defendants' request for attorneys' fees and any costs not properly taxable as court costs should be denied

IT IS SO ORDERED.

Signed this 24th day of August, 1998.

/s/ Paul Brown
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40928

MARK HARRY GABRIEL

Plaintiff - Appellant

v.

CITY OF PLANO; ET AL

Defendants

CITY OF PLANO; MARK HUNT, in his official capacity as City of Plano police officer; TERRY PAULEY, in his official capacity as City of Plano Police Department; ROBERT LEITZ, in his official capacity as City of Plano police officer

Defendants - Appellees

Case No. 00-40021

MARK HARRY GABRIEL

Plaintiff

v.

CITY OF PLANO; ET AL

Defendants

CITY OF PLANO; MARK HUNT, in Official Capacity as City of Plano police officer; TERRY PAULEY, in this Official Capacity as City of Plano Police Dept; ROBERT LEITZ, in Official Capacity as City of Plano police officer

Defendants - Appellees

v.

BRUCE W GREEN; BRIAN FAHLING; MICHAEL J DEPRIMO; BRYAN J BROWN; PHIL PRESCOTT

Appellants

Appeals from the United States District Court for the Eastern District of Texas, Sherman

---

ON PETITION FOR REHEARING EN BANC

(Opinion 06/13/00, 5 Cir., ___, ___ F.3d ___)

(Filed July 20, 2000)

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick Higginbotham
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK HARRY GABRIEL, Plaintiff, **v.** **CITY OF PLANO, TEXAS OFFICER MARK HUNT,** in his official capacity as a member of the City of Plano Police Department; **OFFICER TERRY PAULEY,** in his official capacity as a member of the City of Plano Police Department; and **OFFICER ROBERT LIETZ,** in his official capacity as a member of the City of Plano Police Department, Defendants.	**Civil Cause No. 4:96CV362** **Brown, J.** **AFFIDAVIT OF BRYAN J. BROWN RESPONDING TO DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SANCTIONS AND AWARD OF ATTORNEYS' FEES**

* * *

Defendants' Allegations in Paragraph B:

1. Defendant's allegations as to the naming of Mayor Longstreet and the individual officers in their ***official*** capacity reveal that Defendants continue to misunderstand the significant difference between naming a governmental officer in his/her official or personal capacity.

2. Plaintiff already defended and thoroughly explained the naming of Mayor Longstreet and the officers in Plaintiff's Response to Defendants' Motion to Dismiss and Brief in Support.

3. Plaintiff did indeed respond to Defendants' arguments as to service of process on the officers by effectuating yet more costly service. *See* Plaintiff's responsive brief, *supra*, p.4 & n.2. The officers had originally been served via the City Secretary, who assured the process servers that she was accepting service for the officers in their official capacity. Plaintiff responded to Defendants' argument by effecting personal service, toward the goal of speeding this litigation on toward resolution.

4. The naming of the officers was not for reasons of harassment, but in order to clearly identify the actual Plano agents who were ultimately responsible for the acts at issue. By naming the officers, Plaintiff was afforded the right to depose the same, without seeking leave of court.

5. Strasburger & Price seek $3,775.50 in costs and fees for advancing their only marginally successful motion to dismiss arguments regarding service of process on officially named officers of the City of Plano.

Defendants' Allegations in Paragraph F:

1. One of Defendants' constant refrains is that Plaintiff was dilatory in conducting discovery. A review of the correspondence and pleadings file reveals that this charge lacks

foundation. Plaintiff was essentially locked out of the Court from November, 1996 to June, 1997, due, in large part, to Defendants' filing of the Walker affidavit and representation to the Court that said affidavit revealed Plaintiff faced no irreparable harm. *See* paragraph A. Given the distance (Tupelo to Dallas) and the costs involved in depositions and other discovery, Plaintiff patiently waited until the Court ruled on Defendants' motion to dismiss to begin discovery.

2. Such waiting to begin discovery is in keeping with the spirit of the federal rules and the cost-savings aspirations of the Local Rules and Civil Justice Expense and Delay Reduction Plan. This litigation had no track assignment until June, 1997. Since track one and two allow no depositions, interrogatories, or requests for admissions, Plaintiff could not be certain that substantive discovery would be allowed until after track assignment was made. Fed.R.Civ.P. 26(d) withholds discovery until a meeting pursuant to (f) is held. Neither such a meeting, nor Local Rule CV-16's case management conference was held prior to June, 1997.

3. Plaintiff tendered his initial disclosures on March 27, 1997, two months prior to the June case management conference.

4. Defendants failed to tender their initial disclosures until June 20, 1997, almost three weeks after the case management conference.

5. During the course of depositions, Defendants "produced" several non-party witnesses who were eyewitnesses to the event pled. Defendants agreed to produce some managerial police officers in trade for additional hours in which to depose Mr. Gabriel.

6. Defendants produced 3500 pages of documents in response to Plaintiff's *subpoena duces tecum*. These documents were labeled irrelevant by defense counsel, and were produced as a "courtesy." *See* August 26, 1997 letter from LaBrec to Brown, attached as appendix F.*

7. Plaintiff propounded the following discovery after the Track III assignment was issued:

   a. Notice to Depose Defendant Lietz — July 10, 1997

   b. Notice to Depose Defendant Pauley — July 10, 1997

   c. Notice to Depose Defendant Hunt — July 10, 1997

   d. Subpoenas to Damewood, Spann, Walker — July 11, 1997

   e. Subpoena to Bangs — Aug. 14, 1997

   f. 1st request for admissions to Pauley and Hunt — Aug. 26, 1997

   g. 1st set of interrogatories to Pauley, Hunt an dLietz — Aug. 26, 1997

   h. 1st request for production of documents to Plano — Aug. 26, 1997

   i. Subpoena to Sgt. Smithheart — Oct. 3, 1997

8. Plaintiff did not use discovery as a harassment tool, or purposely request any information merely to frustrate Defendants. Plaintiff diligently used the discovery process to work up his case.

9. Defendants did not propound the 3500 documents until well into the depositions, on August 27, 1997. This was the day after Plaintiff had tendered written discovery to defense counsel. Defense counsel is incorrect in positing that the written discovery was tendered after the production of the documents.

10. Plaintiff did not purposely tender any redundant discovery requests, and remained well within the contours of the rule that,

> [p]arties may obtain discovery on any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . . including the existence, description, . . . and location of any books, documents, . . . and the identity . . . of any persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought is reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1).

11. The timing of Plaintiff's discovery was within the parameters of Fed.R.Civ.P. 26(d).

12. Plaintiff sought directives and other such statements bearing upon any policies of the

Plano police department as to the enforcement of the Texas statute at bar or other such policies regarding protestors. These policy statements were mentioned in deposition testimony, but proved quite elusive, and were not produced in the 3500 piece "landslide" of documents forwarded to Plaintiff.

13. Plaintiff's counsel, finally, and after detailed discovery probing, were successful in uncovering these paramount policy statements.

14. Defendants mislead the Court as to Plaintiff's arguments in the record, pulling half-sentences out of context and incorrectly labeling them as "admissions of wrongdoing." Defendants' Brief at p.13. The filing Defendants' misquote from was a Court ordered analysis of the written discovery which was ordered in light of revelations found in, and as a result of, deposition testimony given subsequent to the tendering of the written discovery. *see* October 1, 1997 Order. In other words, the Court ordered Plaintiff to review written discovery requests after Defendants argued that the answers had been given in depositions taking place after the written discovery requests were filed.

15. Plaintiff's counsel have no desire to engage in Wittgensteinian linguistic analysis of past filings, but must set the record straight as to the "colorable" quotes that defense counsel misquotes from Plaintiff's filing with the Court:

[H]aving compared Defendants' analysis of the interrogatories served on August 26, 1997, over and against the deposition testimony elicited in the week after service of the interrogatories, in the interest of compromise [Plaintiff] *will agree that Defendants have a* ***colorable*** *argument as to the duplicitous nature of interrogatories 1-4, 8-10, and 19. This is because Plaintiff served the written interrogatories prior to the last round of depositions, and did procure information in the last round of depositions arguably responsive to some of the written discovery at issue. While Plaintiff continues to believe that Defendants inadequately answered many of these questions in deposition, and that Defendants' interpretation of the deposition testimony is askew, Plaintiff acknowledges that Defendants are advancing a* ***colorable*** *argument allowing the Court to find that interrogatories 1-4, 8-10 and 19 have been addressed (albeit incompletely) in deposition. Plaintiff further accepts Defendants' averments as to their inability to determine the answers to interrogatories 11 and 16, since the non-party Plano Independent School District may indeed be the governmental agency holding such records, and Defendant City of Plano asserts a* ***colorable*** *argument that they have no duty to seek out this information. Plaintiff further recognizes that the must accept Defendants' refusal to make the measurements requested by interrogatories 17 and 18, since Plaintiff cannot mandate that Defendants* ***informally survey*** *the land that they police.*

Plaintiff further herein removes the qualifiers revealing the named Defendant to whom the interrogatory is reasonable [sic] *addressed. Plaintiff included said qualifiers only as an organizational tool, and, given Defendants' objection, does herein remove the same.*

Plaintiff does yet maintain that Defendant is under a duty to answer interrogatories 5, 6, 7, 12, 13, 14, and 15. Plaintiff further posits that Defendant City of Plano appears to labor under a misconception regarding its responsibility to answer Plaintiff's questions in light of a named officer's answer of ***"I don't know."*** *Plaintiff asserts that the City of Plano is not excused from answering discovery questions simply because the named deponents are unable to recall details or are ignorant as to relevant matters. Defendants rather have a duty of reasonable inquiry, be it in the drafting of pleadings, disclosure of documents and witnesses, and the answering of discovery requests. Because such reasonable inquiry seems to have been lacking at times in the development of this suit, Defendant City of Plano should be ordered to respond to the written discovery tendered herein.*

Plaintiff's Opposition to Defendants' Motions Seeking to Quash All Written Discovery and Plaintiff's Memorandum of Law In Support of Motion to Compel Defendants To Answer Plaintiff's Abbreviated First Set of Interrogatories, pages 1-2

(hereinafter Plaintiff's Opposition) (emphasis added).

16. Defendants failed to apprise the Court of Plaintiff's reasons, explained above, for not pressing forward with demands that the Defendants answer all of the tendered written discovery. (*See* Defendants' Brief, ¶ F, p.13).

17. Defendants find it sanctionable that Plaintiff would question Defendants' "I don't know" responses to requests for admission. Yet according to Fed.R.Civ.P 36(a),

> An answering party may not give lack of information or knowledge as a reason for failure to admit or deny ***unless*** the party states that the party had made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. [Emphasis added].

Defendants' "I don't know" responses lacked this certification of inquiry.

18. Defendants pray for $8439 in costs and fees from Plaintiff's counsel, submitting as their main evidence Plaintiff's briefing filed pursuant to the Court's order that Plaintiff perform an evaluation of his discovery.

Defendants' Allegations in Paragraph G: See DePrimo affidavit

Defendants' Allegations in Paragraph H:

1. In ruling upon Plaintiff's motion to re-open the time period for designation of expert

witnesses, His Honor agreed that Defendants' designation was untimely, but still allowed the designation.

2. Defendants neither put on, nor attempted to put on, their experts on legal fees in this matter.

3. Defendants pray for $262 in costs and fees from Plaintiff's counsel, submitting as evidence only Plaintiff's opposition to their admittedly untimely filing of unnecessary expert witnesses.

* * *

Defendants' Allegations in Paragraph O:

1. Defendants misrepresent the facts of record in stating that "[w]hen called upon to present evidence to support their Motion for Disciplinary Action, [Plaintiff's counsel] presented none." Defendants' Brief, ¶ O, p.23.

2. Defendants misrepresent the record in stating that "neither the Court nor the state has found any basis in fact to support [Plaintiff's] assertions." Defendants' Brief, ¶ O, p.23.

3. Defendants' allegations that Plaintiff's counsel wrongfully and "secretly" filed *ex parte* disciplinary complaints arises out of a misunderstanding of the rules governing such actions. Defendants' Brief, ¶ O, p.22.

4. Plaintiff's counsel rightly and reasonably interpreted the rules governing submissions of allegations of ethical impropriety as requiring *ex parte* filings.

5. Plaintiff's counsel interpreted Local Rule AT-2(d)(2)(A) as reserving unto the Judge the right to notify opposing counsel "[i]f the court determines that further disciplinary proceedings are necessary."

6. Plaintiff's counsel interpreted State Bar Rule Art. 10, § 9, Rule 8.03(a) as placing a duty upon counsel to "inform the appropriate disciplinary authority." This interpretation of the rules is mandated by the State Rules of Disciplinary Procedure, Section II, Rule 2.09, which states that allegations are to be forwarded to the Office of the Chief Disciplinary Counsel, who will, if the "statement is determined to constitute a Complaint" inform the complained-of attorney of the allegations.

7. Plaintiff's counsel determined that the State Bar would then notify defense counsel when, and if, it determined an investigation was warranted.

8. The Court must have found enough basis to believe that defense counsel "might" have engaged in action warranting discipline, for the court "notif[ied] the lawyer of the charges and g[a]ve the lawyer opportunity to show good cause why he . . . should not be [disciplined]." Local Rule AT-2(d)(2)(A).

9. The State Bar Office of Chief Disciplinary Counsel likewise followed Rule 2.09, notifying Attorney LaBrec of the charges and date of hearing after its initial investigation.

10. The State Bar received oral testimony and argumentation supporting Plaintiff's charge, including testimonial evidence well supporting the charge that a document had been altered (by 'privilege' stamping, at a minimum).

11. Attorneys Fahling and DePrimo joined me in submitting detailed affidavits regarding the events that we believe constituted a breach of Attorney LaBrec's ethical duties. Attorney Fahling and I appeared before the State Bar and answered their inquiries of us. (Attorney DePrimo was out of the country at the time the State Bar tribunal met.) Attorneys DePrimo and Fahling appeared in federal court with me to answer as to the filing of the Motion for Disciplinary Action.

12. The State Bar determined that this evidence was "insufficient" to support a charge of "professional misconduct." March 17, 1998 correspondence from Nancy Thursby to Brian Fahling, attached in appendix O.*

13. Plaintiff's counsel did not file the complaints as a litigation tactic, but filed the complaints because they were duty bound to "inform the appropriate disciplinary authorit[ies]," once they discovered that a document had been altered and a discovery file was reconstituted as work-product. State Bar Rule Art. 10, § 9, Rule 8.03(a).

14. Defendants pray for $12,613.50 in costs and fees from Plaintiff's counsel for the filing of these allegedly "clearly retaliatory" complaints.

Defendants' Allegations in Paragraph P: *See* DePrimo Affidavit

---

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK HARRY GABRIEL, Plaintiff, v. **CITY OF PLANO, TEXAS, OFFICER MARK HUNT,** in his official capacity as a member of the City of Plano Police Department; **OFFICER TERRY PAULEY,** in his official capacity as a member of the City of Plano Police Department; and **OFFICER ROBERT LIETZ,** in his official capacity as a member of the City of Plano Police Department, Defendants.	**Civil Cause No. 4:96CV362** **Brown, J.** **AFFIDAVIT OF MICHAEL J. DEPRIMO RESPONDING TO DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SANCTIONS AND AWARD OF ATTORNEYS' FEES**

* * *

11. At no time during the course of this litigation did my co-counsel or I engage in conduct unbecoming a member of the bar, knowingly fail to comply with the rules governing this litigation, engage in unethical behavior, or conduct this litigation improperly, in violation of Local Rule AT-2.

12. In order to rebut the allegations contained in Defendants' Brief In Support of Their Motion For Sanctions and Award of Attorneys' Fees (hereinafter "Defendants' Brief"), I will address the allegations contained in paragraphs G, L, N & P. The allegations contained in paragraphs A, B, C, D, E, F, H, I, J, K, M, O, & Q will be addressed by Bryan J. Brown in his affidavit submitted simultaneously herewith. The reason for this bifurcation is personal knowledge of the facts as they relate to the allegations of Defendants.

Defendants' Allegations in Paragraph G:

13. On August 27, 1997, during the deposition of Officer Terry Pauley, Defendants produced a large amount of documents pursuant to subpoenas duces tecum served on Officers Hunt and Pauley. As paragraphs 14-16 readily indicate, the issuance of subpoenas duces tecum would have been unnecessary but for Defendants' failure to comply with initial disclosure requirements.

14. Most, if not all, of the documents produced pursuant to subpoenas duces tecum were clearly subject to the disclosure requirements set forth in Article Two, Section (1)(a)(ii) of the Civil Justice Expense and Delay Justice Plan, which states:

> Each party shall, without awaiting a discovery request, provide to every other party . . . [a] copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense.

article Two, Section (1)(a)(ii) of the Civil Justice Expense and Delay Justice Plan.

15. For example, Plaintiff, in his Complaint at ¶¶ 48, 49, 50, and 51, alleged, *inter alia*, that Defendants Lietz, Hunt, and Pauley were inadequately trained and, as a result of such inadequate training, Plaintiff suffered injury. In addition, Plaintiff, in his amended Complaint at ¶¶ 75, 78, 79, and 80, alleged, *inter alia*, that Defendants Lietz, Hunt, and Pauley, as well as Sergeant Smitheart and Lieutenant Rimka, were inadequately trained and, as a result of such inadequate training, Plaintiff suffered injury.

16. Despite the allegations of failure to train, Defendants failed to disclose documents directly relevant to this issue – such as training records – claiming that such documents were irrelevant. Plaintiff was then forced to serve subpoenas duces tecum in order to obtain documents dealing with training records and training materials, police policies, disciplinary records, and the like. *See* Notices of Deposition with attached subpoenas duces tecum, attached hereto as Exhibit 1 of Appendix G. Even upon subpoenas duces tecum, Defendants continued to adhere to their assertion that *no* document requested by Plaintiff was relevant: "It remains our position that the materials which you have subpoenaed are not subject to disclosure because they are irrelevant and do not bear on any claim or defense in this action." Letter from D. LaBrec to B. Brown, dated August 26, 1997, attached hereto as Exhibit 2 of Appendix G. Finally, the following verbal exchange at deposition underscores the objectively unreasonable position taken by Mr. LaBrec with regard to his duty of initial disclosure under the Local Rules:

Mr. Brown: "Well, some of what's been produced are the training records of the officers. Would you agree that that's relevant to this lawsuit?"

Mr. LaBrec: "No, I will not. No, sir. Absolutely not."

Deposition of Officer Terry Pauley, Volume 3, at 112, attached hereto as Exhibit 3 of Appendix G.

17. Plaintiff sought discovery of training records and materials, disciplinary records, police policies and the like in order to determine, *inter alia*, whether there was evidence of prior like incidents. Apart from full and complete discovery, Plaintiff had no vehicle or avenue to make such a determination, since any such evidence was likely to be in the possession of Defendants. In any event, co-counsel and I believed that we were entitled to review any and all documents reasonably calculated to lead to admissible evidence. In their brief, Defendants allege that "Plaintiff himself objected to these documents as "irrelevant" in his pretrial submission to the Court." Defendants Brief at 15. While Plaintiff objected to many of the documents sought to be introduced by Defendants, he did so because such documents dealt with matters wholly irrelevant to the issues at bar, such as training in hazardous materials, helicopter rappelling, and police vehicle operation. *See* Joint Final Pretrial Order at 62-79. On the other hand, Plaintiff sought to introduce documents produced in discovery that we believed were relevant to the issues at bar, such as police policy documents and school policy documents.

18. Most of the documents produced pursuant to the subpoenas duces tecum were furnished to Plaintiff's

counsel in a large stack during the deposition of Officer Pauley. Defendants allowed Plaintiff's counsel approximately one hour to review these documents, during which time I discovered the internal affairs report on the incident with Mark Gabriel. This internal affairs report was contained in a file folder marked "Non-Sustained Complaints-Hunt," which file folder was in the stack of documents produced by Defendants. After a review of this internal affairs report, I handed it to co-counsel Brian Fahling. While he was reading it, defense counsel reappeared and requested the return of the report. Mr. Fahling complied with this request, but demanded that the report be re-produced, since he believed it was a discoverable document. Defense counsel refused such demand. (For the full factual history of this incident, *see* Plaintiff's Motion to Compel Documents and for Sanctions, the memoranda in support thereof and attachments thereto, including affidavits, and Plaintiff's reply brief with supporting affidavits. These documents are all part of the record).

19. Because Defendants refused to re-produce the internal affairs report, co-counsel and I determined to file a motion to compel the production of such report. I then prepared the motion, brief, affidavits, and other supporting documentation. Such documents contained approximately fifty-four (54) pages. I therefore prepared and filed a motion for leave to exceed the page limitation imposed by Local Rule CV-7(a)(2). This motion was granted on September 24, 1997, without opposition from Defendants. These documents were then submitted to the Court for filing.

20. Because I was concerned that a delay in the hearing of this motion could prevent us from obtaining the internal affairs report (the scheduled trial date of October 1, 1997 was less than a month away, and fast approaching), and because of my concern that defense counsel could object to my motion to exceed the page limits or otherwise delay the hearing of this motion by waiting until the last day to respond to same, I decided to preempt such possibilities by redrafting condensed versions of the motion, brief and my affidavit in order to comply with the fifteen (15) page limitation. Plaintiff then submitted these redrafts to the Court. I did this in order to achieve timely review and decision by the Court.

21. Notwithstanding, I preferred that the Court have the benefit of the full disclosure contained in the original submission of fifty-four (54) pages. Since the motion for leave to exceed the page limitation was granted by the Court quickly, Plaintiff moved to withdraw the second motion and supporting documentation of fifteen (15) pages. Ultimately, the Court ruled on the merits of the original, fifty-four (54) page motion and its supporting documentation.

22. All of the motions and memoranda submitted in support of Plaintiff's Motion to Compel Documents and for Sanctions were filed in good faith and with documented evidentiary support in the form of affidavits. The second, condensed motion was filed for the purpose of obtaining a timely hearing and order on the motion to compel. As noted by Defendants, "[t]his motion, although very similar to the initial motion, was not identical. The second Motion to Compel and for Sanctions urged the same grounds and demanded the same documents, as did

the original motion." Defendants' Brief at 16. The only purpose for the second motion and supporting documentation was to conform to Local Rule CV-7(a)(2) because time was running out. Plaintiff's submission of this second motion was neither vexatious nor unreasonable, but only an attempt to comply with Local Rule CV-7(a)(2).

23. All of the allegations set forth in the multiple pleadings that formed the basis for the Motion to Compel Documents and for Sanctions, its supporting memoranda, and affidavits, were made either with personal knowledge of facts or upon information and belief, as the case may be, and were made with a good faith belief in their truth. At no time did my co-counsel or I make any statement that was unfounded either by the record or our personal knowledge. Rather, each and every statement made in these pleadings were made with a firm belief in their truth and accuracy.

24. On October 2, 1997, the Court ruled that the so-called investigation file constituted work product and was not discoverable. Notwithstanding, the Court ordered Defendants to produce the statement of Officer Mark Hunt, which statement was contained in such file.

25. Shortly thereafter, pursuant to the court's Order, Defendants produced a statement by Officer Mark Hunt purporting to be the statement that co-counsel Brian Fahling and I read on August 27, 1997. Upon close inspection, Mr. Fahling and I realized that this statement was not in fact, the statement we both had read on August 27, 1997. We further believed that the statement had been substituted or otherwise falsified. We had previously determined that defense counsel had appeared to create an

after-the-fact "lawsuit investigation file" to camouflage the internal affairs report to resemble work product instead of what it was – an ordinary police document that was part of Officer Hunt's personnel file. Consequently, being mindful of our mandatory ethical obligations under both the Rules of Professional Responsibility and the rules of this court, we were compelled to file a complaint with the state bar and an *ex parte* motion with the Court to commence disciplinary proceedings. While defense counsel asserts that Plaintiff's counsel presented no evidence to support their Motion for disciplinary Action, Defendants Brief at 23, the record discloses that Plaintiff's counsel in fact presented detailed factual accounts of defense counsel's misconduct in the form of sworn affidavits. Contrary to defense counsel's claim that [n]either the Court nor the state has found any basis in fact to support [Plaintiff's] assertions," Defendants' Brief at 23, both proceedings, after formal hearing, were dismissed for "insufficient evidence of professional misconduct." *See, e.g.*, letter from the Office of the Chief Disciplinary Counsel, Texas State Bar to Brian Fahling, dated March 17, 1998, attached hereto as Exhibit 4 of Appendix G.

26. On October 20, 1997, subsequent to the deposition of Sgt. Smitheart, Plaintiff filed his Motion to Reconsider Release of Statements Made to Internal Affairs Based Upon New Evidence Obtained During 10-8-97 Deposition of Officer Smitheart. In support of this motion, Plaintiff submitted deposition testimony by Sgt. Smitheart that was in direct contradiction to the sworn testimony of Officers Lietz, Hunt, and Pauley. Consequently, Plaintiff argued that the statements made to internal affairs by Sgt. Smitheart were of potential

impeachment value. Also, because Plaintiff was unable to depose Lt. Rimka, he asked the Court to reconsider the release of Rimka's statement to internal affairs as well. On November 10, 1997, the Court denied this motion.

27. The Motion to Reconsider Release of Statements Made to Internal Affairs Based Upon New Evidence Obtained During 10-8-97 Deposition of Officer Smitheart was submitted to the Court with a good faith belief that such motion was warranted by newly discovered facts uncovered in the Smitheart deposition, which facts were not available to Plaintiff when the initial motion was filed.

28. Strasburger & Price seeks sanctions and attorneys' fees in the amount of $5,804.50 allegedly because it was "forced to respond to no less than eleven (11) motions demanding production of [the internal affairs report] file." Defendants' Brief at 18.

29. Notwithstanding defense counsels' allegations, each of these motions were necessary for the furtherance and/or protection of Plaintiff's legal interests, and were a part of the normal ebb and flow of civil rights litigation. Paragraphs 30-39 below set forth the sequence of the filing of Plaintiff's motions and briefing to compel documents.

30. On or about September 9, 1997, I sent to the Court the following three (3) motions: Motion to Compel Documents and for Sanctions; Motion for Leave of Court to Exceed Page Limit; and Motion for Expedited Hearing and Shortened Response Time. Defendants filed no document in opposition to Motion for Leave of Court to

Exceed Page Limit, or to the Motion for Expedited Hearing and Shortened Response Time. Defendants, on or about September 25, 1997, filed an eight (8) page Response, plus attachments, to Plaintiff's Motion to Compel Documents and for Sanctions.

31. On or about September 15, 1997, Plaintiff filed with the Court a Motion for Leave to Withdraw Memorandum of Law in Support of Motion to Compel Documents and for Sanctions submitted to the court for filing on or about September 8, 1997, and to Substitute Therefor Memorandum of Law in Support of Motion to Compel Documents and for Sanctions submitted for filing on or about September 11, 1997. The reason for this motion was to substitute memoranda in order to correct minor errors. This motion was granted by the Court on September 24, 1997. Defendants filed no document opposing this motion.

32. On or about September 17, 1997, Plaintiff filed the second, condensed motion and supporting memoranda as identified in ¶ 15, above. Defendants filed no document in opposition to this second, condensed motion; they filed one response to the Motion to Compel Documents and for Sanctions, on or about September 25, 1997, consisting of eight (8) pages plus attachments.

33. On September 26, 1997, Plaintiff filed a Motion to Strike All Unsupported Factual Assertions in Defendants' Response to Motion to Compel and for Sanctions. This motion was prompted by Defendants failure to support the factual allegations contained in the Response with affidavits, as required by Local Rule CV-7(b) and strong Fifth Circuit case law. Co-counsel Brian Fahling,

Bryan Brown, and I each submitted sworn affidavits in support of the Motion to Compel Documents and for Sanctions, detailing at great length how we came into possession of the internal affairs report, and the contents of such report when reviewed. Defendants, on the other hand, filed no affidavits in support of their factual allegations, or any other admissible evidence. This motion was denied by the Court from the bench after oral argument on September 26, 1997. Defendants filed no document in opposition to this motion, but addressed the motion at oral argument on September 26, 1997.

34. On September 25, 1997, Plaintiff filed a Motion for Leave of Court to exceed Page Limitations on Plaintiff's Reply Brief to Defendants' Response to Plaintiff's Motion to Compel Documents and for Sanctions. This motion was granted on September 29, 1997. Defendants filed no document in opposition to this motion.

35. On or about September 26, 1997, Defendants filed a four (4) page brief designated as Defendants' Brief Regarding Lawyer's Duty Upon Receipt of Privileged or Confidential Material.

36. On September 29, 1997, Plaintiff filed his Reply to Defendants' Response to the Motion to Compel and for Sanctions. Contrary to Defendants' assertions that "counsel reurges the identical arguments as to why the file should be produced, for the sixth, seventh, and eighth times," Defendants' Brief at 16, the Reply Brief categorically rebutted each factual and legal argument set forth in Defendants' Response. The Reply was not repetitive but rather surgically precise in dissecting each of the Defendants' factual and legal arguments.

37. On October 15, 1997, Plaintiff filed a Motion for Leave of Court to Exceed Page Limitations on Plaintiff's Motion to Reconsider Release of Statements Made to the Department of Internal Affairs Based Upon New Evidence Obtained During 10-8-97 Deposition Testimony of Officer Smitheart. This motion, apparently, was not ruled upon. Defendants filed no document in opposition to this motion.

38. On October 15, 1997, Plaintiff filed a Motion to Reconsider Release of Statements Made to the Department of Internal Affairs Based Upon New Evidence Obtained During 10-8-97 Deposition Testimony of Officer Smitheart. This motion was denied by the Court by order dated November 7, 1997. Defendants, on or about November 4, 1997, filed a four (4) page response to this motion.

39. On October 21, 1997, Plaintiff filed a Motion to Retain Investigation File Under Seal through post trial proceedings. This motion was granted by order dated November 13, 1997. Defendants filed no document in opposition to this motion.

40. In all, Defendants filed three (3) documents in response to the motions filed by Plaintiff arising out of Plaintiff's attempt to compel production of documents, one consisting of eight (8) pages, plus attachments, a second consisting of four (4) pages, and a third consisting of four (4) pages. In sum, though Defendants claim they were "forced to respond to no less than eleven (11) motions demanding production of [the internal affairs report] file," Defendants' Brief at 18, the record discloses that they responded only three (3) times.

* * *

Defendants' Allegations in Paragraph P:

50. In Paragraph P. Defendants grossly exaggerate when they allege that "Plaintiff's counsel strongly emphasized the excessive force claim" and "most of the discovery was spent on this issue." Defendants' brief at 23. In fact, the unreasonable seizure claim was only one of six (6) causes of actions alleged by Plaintiff in his Amended Complaint, and one of three (3) causes of action alleged in the original Complaint.

51. Discovery on the issue of training went not only to search and seizure, but to failure to train in the area of first amendment rights and public fora. Early on, co-counsel and I knew that failure to train was a key element that needed to be proven at trial. Therefore, training records and materials in the areas of search and seizure, first amendment rights, and public fora were a keen focus of our discovery inquiry. Naturally, we pursued discovery in the area of training records and materials on the claim of unreasonable seizure, since, at the time of discovery and thereafter, we intended to pursue through trial what we believed was a viable fourth amendment claim.

52. At no time during the course of this litigation did we assert the unreasonable seizure claim with the intent of abandoning the claim at trial. When co-counsel and I included the unreasonable seizure claim in the Amended Complaint and Joint Final Pre-Trial Order, it was because we believed that the claim was viable (supported by fact and existing law), and because we intended to prosecute the claim through trial.

53. At all times up to the eve of trial, co-counsel and I intended to prosecute the unreasonable seizure claim. Two days before trial, at the final pre-trial conference on Monday, January 5, 1998, the Court directed Plaintiff's counsel to review certain cases on point to the issue of failure to train. *See* Transcript of Final Pre-Trial Hearing at 32-33, attached hereto as Exhibit 1 of Appendix P ("I want you-all to go back and carefully read *Harris v. City of Canton*, and any Supreme Court opinion since that case . . . . Before I'm going to go forward on a training claim, you're going to have to bring me some awful strong evidence"); *see also* Trial Transcript at 14-15, attached hereto as Exhibit 2 of Appendix P. Complying with the Court's directive, co-counsel and I again reviewed such cases, finding that, while certainly not impossible, eliciting "awful strong evidence" of failure to train on the issue of use of force could be difficult, potentially obscuring the other claims. That evening, we made the decision to forego the unreasonable seizure claim and instead focus on the remaining five causes of action. We reasoned that each of the remaining five claims had the same common denominator, *i.e.*, the right to *future* access of the forum at issue for purposes of free speech and literature distribution, while the unreasonable seizure claim stood alone as a *past* event different in kind from the other five speech-related claims.

54. The decision to forego the unreasonable seizure claim was made the day before trial, when we were finalizing our trial strategy. Significantly, our decision was made after sober reflection upon the Court's explicit advisement the day before that "you're going to have to bring me some awful strong evidence" on the training

issues, and our belief that the unreasonable seizure claim, though viable, could be more difficult to prove then Plaintiff's other claims, which were all speech-related. Even though co-counsel and I believed that both the facts and existing law supported this claim, it was our reasoned professional judgment that such claim was not central to the primary purpose of the litigation, which was to open up the R.C. Clark High School forum for the free exercise of Plaintiff's speech and literature distribution. Believing, therefore, that the unreasonable seizure claim could "muddy the waters" by detracting from Plaintiff's speech-related claims which, we believed, were of greater and primary importance, we decided to withdraw the unreasonable seizure claim.

55. Our decision to withdraw the unreasonable seizure claim was made for a proper purpose: to sharpen the focus of the trial. No improper motive influenced our decision to withdraw this claim. Further, the decision to withdraw the unreasonable seizure claim was made only after sober reflection upon the Court's advisements made during the final pre-trial conference on January 5, 1998, two days before trial, and after reasoned judgment in the faithful representation of our client.

56. Strasburger & Price seek sanctions and attorneys' fees in the amount of $22,376.00 as a penalty for Plaintiff counsel's reasonable and proper decision to withdraw the unreasonable seizure claim.

Further Affiant Sayeth Not.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Michael J. Deprimo
MICHAEL J. DEPRIMO

SWORN TO and subscribed before me this the 18th day of September, 1998.

/s/ Christy Diane Filgo
NOTARY PUBLIC

Notary Public State of Mississippi At Large
My Commission Expires [Illegible] 21, 2000
BONDED THRU HEIDEN-MARCHETTI, INC.

My Commission expires: _____

(LOGO) *P.O. Box 890358*
Plano, Texas 75006-0358
214-424-8631
Fax. No. 214-424-0088

MEMORANDUM **(LOGO)**

DATE: October 25, 1996

TO: All Patrol Supervisors

FROM: John Brockman, Captain, Patrol Services Division

SUBJECT: Protesting at Public Schools

Effective immediately, and until further notice, the following procedures will apply to all incidents involving protesters at Plano public school facilities.

- A patrol supervisor will respond to the scene of any incident in which person(s) are protesting, demonstrating, or otherwise exercising their right to free speech in or near a public school facility in Plano.
- Any course of action chosen to handle the incident will take into full consideration the rights of the person(s) involved to exercise free speech in a public place.
- Prior to taking any level of enforcement action, including simply suggesting to the person(s) that they move on, the on-scene supervisor will confer with the police legal adviser, by telephone or in person.

jb

c: Public Safety Communications
R. L. Smitheart, Sergeant
Warren Spencer, Legal Adviser
Bruce D. Glasscock, Chief of Police

John Brockman

11/14/96 03:31 PM

To: Steve Hagy/Plano Police Dept., Harry Manning/ Plano Police Dept., Paul Rimks/Plano Police Dept., Mike Tower/Plano Police Dept., Larry Lane/Plano Police Dept., Woody Bryan/Plano Police Dept.

cc: Greg Pushin/Plano Police Dept.

Subject:Protests at Clark High School

Due to the possibility of future protests at Clark High School, the following guidelines have been agreed upon by PPD and PISD officials.

1. Persons will be allowed to protest in front of Clark High School, so long as they remain in an area bounded on the south by the north curb line of Spring Creek Parkway and bounded on the north by an imaginary line 35 feet north of and parallel to the north curb line of Spring Creek Parkway. This area has been determined according to city records of school and public property lines.

2. PISD officials will be provided a standardized criminal trespass warning statement which may be read to any protester who enters upon or potentially enters upon PISD property. To be effective, the warning will *not* have to be read in the present of a police officer, as long as the PISD official who gives the warning is willing to testify in court that the warning was duly read to the trespasser.

Please make your officers aware of this information. Contact me if you have questions.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK HARRY GABRIEL, Plaintiff, v. CITY OF PLANO, TEXAS, MAYOR JOHN LONGSTREET, in his official capacity as Mayor of the City of Plano, Texas, OFFICER MARK HUNT, in his official capacity as a member of the City of Plano Police Department, OFFICER TERRY PAULEY, in his official capacity as a member of the City of Plano Police Department, and OFFICER ROBERT LIETZ, in his official capacity as a member of the City of Plano Police Department, Defendants.	§ § § § § § § § § § § § § § § § § § § §	Civil Case No. 4:96CV362

AFFIDAVIT OF IN SUPPORT OF DEFENDANTS' MOTION FOR SANCTIONS AND AWARD OF ATTORNEYS' FEES AND BRIEF IN SUPPORT OF SAME

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared David J. LaBrec, who being by me first duly sworn upon oath states as follows:

1. My name is David J. LaBrec. I am a partner in the firm of Strasburger & Price, L.L.P., which represents Defendants City of Plano, Texas, Officer Mark Hunt, Officer Terry Pauley, and Officer Robert Lietz in the above-entitled and numbered cause.

2. I am over eighteen years of age and am of sound mind. I have never been convicted of a felony, have personal knowledge of every statement herein made and am fully competent to testify to the matters stated herein, which are true and correct.

3. I am an attorney licensed to practice in the State of Texas and have been so licensed since 1973. I am licensed to practice law in the Eastern, Western, Northern and Southern Districts of Texas, the 5th and 11th Circuits and United States Supreme Court.

4. As Defendants' attorney and the Attorney-in-Charge for this case, I am familiar with the actions taken by Plaintiff and his counsel in pursuing his claims.

5. Attorneys' fees and expenses in the amount of at least $87,287.00 were incurred unnecessarily due to the conduct of Plaintiff's counsel in this case as detailed in Defendant's Motion for Sanctions and Award of Attorneys' Fees and Brief supporting same. Attached Exhibit A-1 contains a breakdown of those fees as they correspond to the various specifics of Plaintiff's counsel's misconduct as described in Defendants' Brief. This amount is a conservative assessment of the fees incurred as a result

of Plaintiff's counsel's actions in this case. The rates of the attorneys involved in this lawsuit change in November of each year, as is the usual and customary practice at Strasburger & Price, L.L.P. My hourly rate ranged from $180.00 to $190.00 per hour, the hourly rate of Melinda Bradley ranged from $130.00 to $150.00 per hour, the hourly rate of Marion Oliver ranged from $110.00 to $125.00 and the hourly rate of William Adams ranged from $95.00 to 115.00. We have primarily worked on this file. Other lawyers and legal assistants have also worked on this file. All rates charged have been to defend this case and are the usual and customary rates for services of this type rendered in Texas and in this Federal District.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK HARRY GABRIEL,	§	
Plaintiff,	§	
	§	
v.	§	Civil Case
	§	No. 4:96CV362
CITY OF PLANO, TEXAS, MAYOR JOHN LONGSTREET, in his official capacity as Mayor of the City of Plano, Texas, OFFICER MARK HUNT, in his official capacity as a member of the City of Plano Police Department, OFFICER TERRY PAULEY, in his official capacity as a member of the City of Plano Police Department, and OFFICER ROBERT LIETZ, in his official capacity as a member of the City of Plano Police Department,	§	
Defendants.	§	

SUMMARY OF LEGAL FEES

The legal fees incurred for each section enumerated A-Q in Defendants' Brief in Support of Their Motion for Sanctions and Award of Attorneys' Fees break down as follows:

Section A.	$4,300.50
Section B.	3,775.50
Section C.	1,740.00
Section D.	379.50
Section E.	192.00

Section F.	8,439.00
Section G.	5,804.50
Section H.	262.00
Section I.	2,457.50
Section J.	.00
Section K.	202.50
Section L.	780.00
Section M.	515.00
Section N.	2,149.00
Section O.	12,163.50
Section P.	22,376.00
Section Q.	21,750.50
TOTAL	$87,287.00

* * *

AMERICAN FAMILY ASSOCIATION

LAW CENTER

[Address And Telephone Number Omitted In Printing]

November 19, 1996

Mr. David J. LaBrec, Esq.
Strasburger & Price, L.L.P.
Suite 4300
901 Main Street
Dallas, Texas 75202

Via facsimile (214) 651-4330 and regular U.S. mail

Re: Clarification of City of Plano's position in *Gabriel v. City of Plano, Texas, et al.*

Dear Mr. LaBrec:

I am in receipt of a facsimile copy of Defendants' Motion For Extension Of Time and Supplement To Motion For Extension Of Time in the above-entitled matter. The purpose of this correspondence is to clarify the City of Plano's position with respect to Mr. Gabriel's exercise of his constitutional rights in front of R.C. Clark High School.

Attached to Defendants' Supplemental Motion For An Extension Of Time To Respond To Plaintiff's Motion For Injunction And Memorandum In Support is the Affidavit of Deputy Sheriff Tim Walker. Presumptively, you attached Deputy Walker's Affidavit in order to show that Mr. Gabriel may exercise his constitutional rights in front of R.C. Clark High School without any threat or fear of intervention from law enforcement officials of the City of Plano. That appears to be the plain import of Deputy

Walker's Affidavit, since you offer it to counter Mr. Gabriel's assertion of a chill in the exercise of his constitutional rights by threats of arrest by City of Plano police officers.

Please advise if our understanding of the City of Plano's position is incorrect. Otherwise, we understand the City's position to be that Mr. Gabriel is free to exercise his free speech rights in the public fora surrounding R.C. Clark High School, as set forth in plaintiff's Verified Complaint, without concern for the threat of arrest or intimidation by City of Plano police officers.

Sincerely,

/s/ Bryan J. Brown
Bryan J. Brown
Staff Attorney

BJB:bg

cc: Phillip Prescott, Esq.

AMERICAN FAMILY ASSOCIATION
LAW CENTER

[Address And Telephone Number Omitted In Printing]

November 21, 1996

Mr. David J. LaBrec, Esq.
Strasburger & Price, L.L.P.
Suite 4300
901 Main Street
Dallas, Texas 75202

Via facsimile (214) 651-4330 (at 16:15 hours) and regular U.S. mail

Re: Clarification of City of Plano's position in *Gabriel v. City of Plano, Texas, et al.*

Dear Mr. LaBrec:

The purpose of this letter is to follow-up my correspondence dated November 19, 1996, (and transmitted to you via facsimile at 16:10 hours on November 19) in which we sought clarification of the City of Plano's position with respect to Mr. Gabriel's exercise of his constitutional rights in the public fora adjacent to Spring Creek Parkway and directly in front of R.C. Clark High School.

Based on your failure to advise otherwise, we understand the City's position to be that Mr. Gabriel is free to exercise his free speech rights in the public fora surrounding R.C. Clark High School. We understand the Defendants in this action to be deferring to the Plaintiff's description of this public fora, as set forth in Plaintiff's Verified Complaint. Thus we understand the Defendants to be averring that Mr. Gabriel should feel free to access said fora, without concerns regarding the threat of arrest or intimidation by City of Plano police officers. In other

words, our understanding is that Mr. Gabriel is now being afforded, by consent of the Defendants, the relief he is seeking in the pending preliminary injunction motion.

Based upon the foregoing, we will advise our client that: 1) He is free to return to the public right-of-way and fora as defined in the Verified Complaint (prior to the 8:45 a.m. commencement of morning classes); and 2) in said fora Plaintiff may peacefully present his message to passersby through symbolic representations, orderly and legal verbalizations, and literature distribution. Based upon Defendants representation, we will instruct the Plaintiff that he has now been authorized to so exercise his constitutional rights without fearing the threat of arrest or intimidation by Plano police officers. Our advice is based on representations you have made to the court in section I of defendants' Response to Plaintiff's Motion for Expedited Hearing on Plaintiff's Motion For Preliminary Injunction (based upon the affidavit of Tim Walker), as well as your failure to advise otherwise when we sought clarification more then 48 hours ago. As you know, our client is suffering from ongoing forum denial and believes each hour he is restricted to be an hour of irreparable harm. Thus time is of the essence. *Still, before we convey to Plaintiff the representation made in this letter, we urge you, one last time, to clarify if our understanding is not correct.*

Please be advised that, if Mr. Gabriel overcomes the chill effect and musters the courage to return to the public fora adjacent to R.C. Clark High School (based upon Defendants averments), and if in said fora Plaintiff peacefully exercises his constitutional rights prior to the

beginning of classes, and if Defendants once again accost, threaten, arrest or in any way physically assault Plaintiff, said actions will form the basis for personal liability claims against the officers and bad faith claims against the City of Plano.

On a final note, we have not received through the U.S. mails any pleadings filed by Defendants on November 12, 1996. However, you have certified, and noted in a letter to the Clerk, that such pleadings have been forwarded to Plaintiff. Be advised that we are counsel of record in this case and should be served with copies of all pleadings filed by Defendants. Furthermore, our Dallas co-counsel, Philip Prescott, should likewise be served with copies. I am including his address below in an attempt to render this process effortless. The AFALC's information is included in the letterhead of this correspondence. Henceforth, please provide us with copies of all papers filed in this case by Defendants, and please exclude any motions not filed with, or rejected by, the court.

Sincerely,

/s/ Bryan J. Brown
Bryan J. Brown
Staff Attorney

BJB:bg

cc: Phillip Prescott, Esq.
Prescott & Prescott
Fitzhugh Central Suite 710
4131 N. Central Expressway
Dallas, TX 75204
(214) 528-9510
Fax (214) 528-3154

AMERICAN FAMILY ASSOCIATION
LAW CENTER

[Address And Telephone Number Omitted In Printing]

November 22, 1996

Mr. David J. LaBrec, Esq.
Strasburger & Price, L.L.P.
Suite 4300
901 Main Street
Dallas, Texas 75202

Via facsimile (214) 651-4330 (at 14:25 hours) and regular U.S. mail

Re: Clarification of City of Plano's position in *Gabriel v. City of Plano, Texas, et al.* and response to 17:00 hours, November 22, 1996 telephone call from Mr. LaBrec to Bryan Brown.

Dear Mr. LaBrec:

I am writing this letter to memorialize your telephone call to me of last evening. At the outset, I regret that your profanity-laced intimidating telephone style requires me to request that you put all future communications to me in written form and transmit then by facsimile. If you refuse to comply with my request, I will, of course, continue to take your telephone calls. I do ask, however, that you make an attempt to restrain your emotions when placing a call to me, or to anyone at the American Family Association Law Center.

I have reviewed our fax log for the week of November 18 in an attempt to interpret your allegation that I have been inappropriately faxing documents to you. I have identified four fax transmission in the past week: (1) my November 18 letter to you requesting a copy of the

Tim Walker affidavit and all motions filed by the Defendants on November 12; (2) my November 19 letter to you in response to the Defendants' representation of the Tim Walker affidavit; (3) a fifteen page motion for admission *pro hac vice* for Mr. DePrimo and myself; and (4) my November 21 letter following up on the unanswered November 19 letter and letting you know that the November 12 motions were not just delayed in the mail, they were apparently never deposited in the mail.

In reviewing the above, I conclude that the lengthy *pro hac vice* motions should not have been transmitted to your office by fax. My legal assistant misunderstood my directions as to our relationship with your firm. In cases seeking preliminary relief, it has often been our practice to

* * *

STRASBURGER & PRICE, L.L.P.

ATTORNEYS AND COUNSELORS
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS

[Addresses Omitted In Printing]

DAVID J. LaBREC
(214) 651-4752

November 25, 1996

Mr. Bryan J. Brown
Staff Attorney
American Family Association
Law Center
107 Parkgate Drive
P.O. Drawer 2440
Tupelo, Mississippi 38803

Re: Case No. 3-96CV2904-G; ***Mark Harry Garbiel v. City of Plano, Texas, et al.***

Dear Mr. Brown:

After I sent you my letter yesterday, I received your November 21, 1996 facsimile and telephoned your office. I will not debate with you the merits of this case by facsimile. In your latest facsimile, you suggest that, because I did not respond to your facsimile where you sought clarification of our position, you are assuming what our position is and so advising your client. You do so at your own peril.

As I told you on the telephone, I will not engage in your pedantics. Do not send me anymore facsimiles suggesting or implying that we are not serving documents as required. I will not discuss that matter with you further. Any further similar facsimiles will be answers by a

Motion for Sanctions and/or a disciplinary or ethics complaint. Mr. Prescott is well apprised about this law firm's practices and professionalism and I would suggest that you confer with him.

I am sending you, by certified mail, return receipt requested, a complete copy of all of the documents that have been filed of record by Defendants in this case. They have been mailed to you previously , sent by fax, and will now be served by certified mail.

If you have any questions regarding the foregoing or any other related matters, please give me the courtesy of a telephone call. Thank you in advance for your anticipated courtesies, professionalism, and future cooperation.

Sincerely,

/s/ David J. LaBrec
David J. LaBrec

DJL:bkm

cc: Mr. Phillip Prescott (with enclosure)
Prescott & Prescott
Fitzhugh Central
4131 North Central Expressway
Suite 710
Dallas, Texas 75204
Via Facsimile: 214/528-3154

AMERICAN FAMILY ASSOCIATION
LAW CENTER

[Address And Telephone Number Omitted In Printing]

October 15, 1997

Honorable Paul N. Brown
United States District Court Judge

Dear Judge Brown:

Enclosed please find an *ex parte* motion to commence disciplinary proceedings against David J. LaBrec pursuant to Local Rule 3(d). It is our understanding of that rule that the motion must be submitted *ex parte*, pending the full Court's determination as to whether disciplinary proceedings should be held.

Given the unusual nature of this rule and these proceedings, we have not included a draft Order along with our motion. Should the Court desire such an Order, we would be happy to furnish one.

Respectfully,

/s/ Brian Fahling
Brian Fahling
Litigation Counsel

BF:sc

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK HARRY GABRIEL Plaintiff, VS. CITY OF PLANO, TEXAS; OFFICER MARK HUNT, in his official capacity as a member of the City of Plano Police Department; OFFICER TERRY PAULEY, in his official capacity s a member of the City of Plano Police Department; and OFFICER ROBERT LIETZ, in his official capacity as a member of the City of Plano Police Department, Defendants.	)	Civil Cause Number 4:96CV362 January 5, 1997 SHERMAN, TEXAS

TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE PAUL BROWN
UNITED STATES DISTRICT JUDGE

* * *

THE COURT: One other thing, now. The Plaintiff's Counsel initiated a – by sending – having a paralegal in their office send my secretary a Motion for Initiation of Disciplinary Proceedings under the local rules of this Court. I consider that a separate matter from the trial of this case on the merits.

I'm going to order the Plaintiffs at this time to file a copy of that complaint under seal, to be placed under seal, serve the party that's complained of with a copy of it. And at an appropriate time, I will conduct a hearing on it.

Any questions about that?

MR. LaBREC: Your Honor, I do have one question. It has been represented to me that Counsel has already filed that motion with the Court. Can I have a representation from Counsel whether or not – on the record, whether or not that is the case?

THE COURT: Counsel, maybe I didn't make myself clear. I stated that it was transmitted by a paralegal in the Plaintiff's Counsel's office to my secretary.

MR. LaBREC: Okay.

THE COURT: And it is to remain in the files of the Court. What I have just said is, I have ordered that

* * *